Vol. 41. Nos 1–2. 2000

HU ISSN 1216-2574

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Editor-in-Chief *Vilmos Peschka*

Akadémiai Kiadó
Budapest

Kluwer Academic Publishers
Dordrecht / Boston / London

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Acta Juridica Hungarica presents the achievements of the legal sciences and legal scholars in Hungary and details the Hungarian legislation and legal literature. The journal accepts articles from every field of the legal sciences. Recently the editors have encouraged contributions from outside Hungary, with the aim of covering the legal sciences in the whole of Central and Eastern Europe.

Manuscripts and editorial correspondence should be addressed to

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H–1250 Budapest, P. O. Box 25
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Distributors

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AKADÉMIAI KIADÓ
P. O. Box 245, H–1519
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KLUWER ACADEMIC PUBLISHERS
P. O. Box 17, 3300 Dordrecht,
The Netherlands
Fax: (31) 78 639 2254
http://www.wkap.nl

Publication programme, 2000: Volume 41 (in 4 issues).

Subscription price: NLG 495.00 (USD 236.00) per annum including postage & handling.

Acta Juridica Hungarica is abstracted/indexed in Information Technology and the Law, International Political Science Abstracts, Political Science Abstracts.

AJur 41 (2000) 1–2

HUNGARIAN ACADEMY OF SCIENCES

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1216-2574 / 2000 / USD 5.00

STUDIES

*Francis A. GÁBOR**

Quo Vadis Domine: Reflections on Ethnic Self-Determination in Central-Eastern Europe

The global world order of the XXIst century still has to be built on the historical experiences of multi-cultural societies in spatial coexistence. The Tribal psycho-linguistic group identities are rooted in distant millenniums and have survived over the centuries. Following the Westphalian peace treaty in 1648, the modern concept of the sovereign nation-state was born and public international law was developed to harmonize and prevent conflicts among these new actors in human history.

The borders of the nation-state, however, were drawn without regard for the ethnic identity of the human subjects. Therefore, the map of the post-Westphalian Europe showed a mosaic of sovereign powers controlling multiethnic societies. This jig-saw puzzle has created the tension and conflicts within the nation-state system for the last 350 years.

In the light of the Kosovo tragedy, the article offers a historical perspective on the unstable international legal protection of ethnic minorities in Central-Eastern Europe, which led to the outbreak of ethnic violence in the post-cold war environment. Contemporary issues in ethnic self-determination are explored,

* The writing of this Article was supported by a research grant provided by the University of Memphis, Cecil C. Humphreys School of Law. The author wishes to express his appreciation to Denise Ceule, a student of his at the University of Memphis, for all of the assistance given in the writing of this article.

followed by a reassessment of the emerging new concept on ethnic self-determination in the region. The article emphasizes the urgent need for the development of an effective international legal and institutional framework for ethnic self-determination.

I. The Internationally Protected Ethnic Self-Determination Model from a Historical Perspective

Upon conclusion of the devastating first world war, a new political and social reality emerged from the ruins of the disintegrating Eastern European empires; people were looking for their cohesive inner forces in a cry for self-determination. As central authorities collapsed, the movement for national self-determination was led by a renaissance in ethnic identity. The old map of Central-Eastern Europe was carved up to new, more homogeneous, nation-states. Czechoslovakia, Romania, and Yugoslavia emerged through the self-determination of their constituents and declared their own state.[1]

The Versailles treaty system arbitrarily changed national territories and borders, and thereby planted the seeds of the second world war. All attempts to create a reliable protection of ethnic minorities failed.[2] There were very few attempts to create some level of protection under international law. However, minority treaties under the supervision of the victorious Antant powers were within bilateral treaties and were entered between the newly emerged nation-states and the successor states of the disintegrating Austro-Hungarian Empire.

The minority treaties were between Poland, Croatia and Slovenia kingdom, Czechoslovakia, and Greece. These treaties theoretically provided very attractive protection for the collective rights of nationals.[3] The treaties guaranteed the full and complete protection of life and liberty without discrimination. These freedoms included the exercise of religion, basic civil and political rights. Minorities were entitled to use their own language and establish their own schools and other charitable, religious and social institutions.[4] It was particularly significant that the use of their own language was guaranteed in courts and

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1 BROLMAN, C. et al. (eds.): *Peoples and Minorities in International Law* (1993) 3–2.

2 *Id.*

3 ROBINSON, J. et al.: *Were the Minorities Treaties a Failure?* (1943) for in depth discussion of the failure of the League of Nations minorities system.

4 KYMLICKA, W.: *The Rights of Minority Cultures*, at 82–86.

religious and other public meetings.[5] The main objective of these minority treaties was analyzed by the Permanent Court of International Justice in its advisory opinion on *Minority Schools of Albania*.[6] The Court found that treaties were guaranteeing (1) perfect equality for minorities and citizens and (2) suitable means for the preservation of the ethnic particularities from their tradition and national characteristics. The minority treaties also guaranteed the collective rights for groups of minorities, granting them the authorization to petition the League of Nations. The minority treaties only applied to countries where minorities were created by the transfer of territories following the Versailles peace treaty system.[7]

The affected countries felt that the application of these treaties had a discriminatory impact and sought their abolition. The lack of effective enforcement in the League of Nations, compounded by the resistance of the affected states, contributed to the dismal failure of the minority treaties to create an effective agreement for protection of ethnic minorities.[8]

Without any exaggeration, the unsettled international legal status of ethnic minorities can be considered one of the major causes of the second world war, the most devastating destruction in history claiming 55 million lives. The lack of international standards for the protection of ethnic minorities provided ammunition to the emerging fascist powers during the period between the two world wars. It offered justification for an aggressive course of action in the name of protecting their own ethnic minorities from the oppressive regimes of the successor state. The League of Nations tolerated the minority treaty system's gradual collapse in the late 1930's.[9] At the same time Hitler made an appealing justification for Germany's course of aggressive action in the name of protecting oppressed german ethnic minorities in the infamous Munich Accord which led to the occupation of Czechoslovakia. The justification of preserving and protecting the German ethnic minorities also provided justification for the invasion of Poland which led to the outbreak of the second world war.[10]

From the ashes of the most devastating human tragedy in recent history, a new international legal order emerged in 1945. The United Nations was created to

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5 *Id.* at 103.

6 Minority Schools in Albania, PCIj, Ser. A/B, No. 64, 1935, at 17.

7 BROLMAN: *op. cit.* at 85.

8 *Id.* 86.

9 KOVÁCS, P.: *A nemzetközi jog és a kisebbségvédelem* (International Law and Protection of Minorities). Pro minorate könyvek. Osiris, 1996, 42–46.

10 *Id.* at 40–41.

preserve peace and security and prevent any reoccurrence of war. In Article 2, Paragraph 4 of the United Nations Charter, the use or threat of use of force became illegal and a violation of a peremptory norm. At the same time, a new code emerged protecting human rights in Article 55 of the United Nations Charter and similar language was employed in the Universal Declaration on Human Rights of 1948.[11]

There was a greater understanding that the human being individually deserved fundamental rights and protections under international legal orders. Therefore, specific references cannot be found for the protection of minorities in the United Nations Charter or the Universal Declaration on Human Rights. Learning from the devastating experience of the minority treaty system and the tremendous tragedy of the second world war, the international community was not ready to gamble and extend protection to certain groups of ethnic minorities. Thus, the basic code on the protection of human rights only addressed the individual.[12] The traveaux preparatoire reflected the United Nations' countries' concerns about preventing immigration of any group and the collective rights of minorities. The concerns could threaten a nation's sovereignty and undermine the integration of immigrants in their home country.[13]

The Covenant of Political and Civil Rights provides specific protection of individual human rights. Article 27 of this Covenant refers to persons who belong to a group of religious or linguistic minorities. The Covenant provides that they shall not be denied the right in their community to enjoy their own culture with other members of their group, to practice their own religion, and to use their own language.[14] This article, however, also reflects a clear individualistic approach. In other words, no group or collective rights are recognized and protected. It still remains to be seen whether an open-minded interpretation of Article 27 of this Convention is forthcoming. Such an open-minded interpretation may lead to an intrinsic recognition and protection of ethnic minorities and cultures of ethnic minorities.[15]

The grand design of the post 1945 world order and the model of international cooperation and protection of the individual in the framework of the United Nations' system collapsed in the midst of the cold war from the late 1940's. This

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11 See generally, SOHN, L. B.: How American International Lawyers Prepared for the San Francisco Bill of Rights, 89, *American Journal of International Law* (1995) 540–553.

12 See BROLMAN: *op. cit.* 86–98.

13 *Id.* at 99–101.

14 *Id.* at 109–110.

15 *Id.* at 111–113.

period can be characterized by the great failure of the international model protecting the human rights of the individual in his or her collective capacity.

The collapse of the communist domination of Eastern Europe in 1989 created a quest for the international protection of individual and collective human rights within nation-state systems with a new global perspective.[16]

II. Contemporary Issues in Ethnic Self-Determination

Ethnic self-determination for minorities living within a sovereign nation-state has not received support from international scholars and experts. In this context, the notion of self-determination was subordinate to the static principle of *uti possidetis* or "territorial integrity".[17] The Helsinki Final Act emphasized the viability of the post-world war II boundaries of Eastern Europe that were drafted in the Yalta agreement. The preservation of the status quo on the basis of the transitional separation of the spheres of influence began in 1945 and was a binding principle until 1989.[18]

After 1989, the sudden collapse of both the external and internal Marxist central authorities created a dangerous power vacuum in the Eastern European region. The struggle for ethnic self-determination became the dominant ideological force in the course of the disintegration of the Soviet Union and Yugoslavia. The Yugoslav tragedy offers the most compelling case for a new approach to the different levels of self-determination in the post-cold war period.[19] In Yugoslavia, it became quite obvious that territorial integrity and ethnic self-determination could not be peacefully reconciled in the midst of the collapse of the central political and economic authorities. The struggle for ethnic self-determination led to genocide and "ethnic cleansing". People retracted into their tribal stage trying to destroy historical human realities.[20] Thus, the vague notion of ethnic self-determination has become a destructive force.

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16 GEROE, M. R.—GUMP, T. K.: Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe, 32 *Columbia Journal of Transnational Law*, 1995, 673–677.

17 See BROLMAN: *op cit.*, 59–70.

18 CLESSE, A. et al. (eds.): *The International System After the Collapse of the East-West Order*, 1994, 54–60.

19 SNEEK, J. W.: The CSCE in the New Europe: From Process to Regional Arrangement, 5 *Indiana International and Comparative Law Review*, 1994, 1–6.

20 See BROLMAN: *op cit.*, 21–27.

More recently, the concept of ethnic self-determination has been the central theme of the conflict in Kosovo. Kosovo is a province in Serbia, the dominant republic in Yugoslavia. Ninety percent of the population in Kosovo is ethnic Albanian; many of whom desire independent statehood apart from Serbia and Yugoslavia. The military unrest between Albanian guerrilla forces and the Serbian military has displaced over 270,000 ethnic Albanians—most are homeless due to Serb attacks.[21] In addition, Western officials estimate that at least 600 ethnic Albanian civilians have been executed by Serb forces. The question here, as in the earlier Yugoslavian conflict in Bosnia-Herzegovina, is whether Kosovo Albanians have an international right to self-determination and secession.

In 1989, Yugoslav President Slobodan Milosevic removed Kosovo's wide-ranging regional autonomy. In response to this action, Kosovo Albanians attempted to restore their autonomy by building political and social institutions. When these peaceful tactics failed, however, the Kosovo Liberation Army emerged and the violence began. Many Kosovo Albanians are fighting for independent statehood, while the Serbian government wants Kosovo to have limited autonomy within Serbia.

In October of 1998, after being pressured by the international community, Serbian authorities announced plans to restore regional autonomy to Kosovo, including returning control of the police and judiciary systems to the local population. Although this is a step in the right direction, many Kosovo Albanians want nothing short of full autonomy with a right to self-determination. The international community seems to reject this Albanian demand for Kosovo independence, and instead prefers some form of internal self-determination for Kosovo, through limited autonomy, without violating Yugoslavia's territorial integrity.[22] Until international legal standards are set concerning the right of ethnic self-determination, the conflict in Kosovo will continue.[23]

The reality of the quest for ethnic self-determination reflects two markedly contrasting trends in the post-cold war environment. The economic and political integration in the European Union has been manifested by emerging supra-national decision-making which limited the sovereignty of the member states. The ethnic-religious-linguistic minorities have been receiving wide scale

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21 See "Uncomfortable Peace in Kosovo", *Christian Science Monitor*, Oct. 14, 1998, at 4.

22 See MALIQUI, S.: Politics—Kosovo/Serbia; Beyond Drnica, *International Press Service*, Mar. 25, 1998.

23 See PERIC-ZIMONJIC, V.: Yugoslavia: U.S. Twists Yugoslavia's Arm to Negotiate with Kosovo, *International Press Service*, Oct. 14, 1998.

recognition and protection in the emerging body of the European Minority Rights.[24] Institutional framework also has developed for the effective protection and implementation of these rights.[25] In summary, a high level of economic and democratic development can resolve the contemporary concept of ethnic self-determination by preserving the multi-ethnic society's integration into the modern sovereign nation-state and the European Union.[26]

III. Reassessment of Ethnic Self-Determination in Eastern Europe One of the Greatest Challenges for Post-Cold War Eastern

Europe lies in the unresolved questions of ethnic self-determination. The unprecedented human tragedy of two world wars did not resolve these questions. The Marxist-dominated regimes in Eastern Europe made extraordinary efforts to ignore and oppress any open debate on the question of ethnic self-determination.[27] The turning point came with the unexpectedly fast collapse of communist control as the "velvet revolution" swept across the region in 1988–1990. The astonishing pace of political transformation has not been accompanied by balanced economic transition to free market economies. Most of the countries have been suffering unprecedented economic crisis.[28] Ethnic conflict has re-emerged as the political central authority has been weakened by the ongoing economic crisis.

From the historical perspective, this ethnic conflict is merely the continuation of unresolved questions in international law: how to protect ethnic minorities living in the territory of another sovereign nation-state when the borders of nation-states do not necessarily follow the historical settlement of ethnic populations. After each world war, people and national borders were artificially rearranged, disregarding any effective protection of ethnic minorities.[29] Therefore, it is not surprising that issues of ethnic self-determination remain to be addressed by the global community of nations in the post-Cold War era.

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24 WIPPMAN, D.: *International Law and Ethnic Conflict*, 1998, 2–21.

25 *Id.* at 7–19.

26 KRESOCK: Ethnic Cleansing in the Balkans: A Legal Foundations of Foreign Intervention, 27 *Cornell International Law Journal*, 1994, 203.

27 BROLMANN: *op. cit.*, 3–27.

28 *Id.* at 29–35.

29 *Id.* at 77–101.

In classic public international law, the individual human being, or individual ethnic group, did not receive any particular protection. Thus, state sovereignty dominated over any claims for individual or ethnic self-determination.

In the midst of the devastating tragedy of the second world war, the human being's special inalienable right to international protection emerged. Following the adoption of the United Nations Charter, a new body of customary international law developed for the protection of human rights.

The concept of the fundamental human right of personal self-determination has been recognized in Article 55 of the United Nations Charter,[30] and has received authoritative construction by several widely accepted United Nations General Assembly Resolutions. During the 1960's, colonial demands for independence were fostered by widespread recognition of the doctrine of national self-determination. Some scholars even believe that this principle has achieved the force of a "peremptory norm", reflecting world public policy.[31]

An understanding of the fundamental human right of determination can lead the foundation of the ethnic self-determination. Individuals, based on their cultural, psycholinguistic, ethnic identity belong to certain groups. From the historical perspective, these groups have leaped together in a certain territorial setting. As the nation-state concept emerged these groups' identities became the constituting element of the evolution of the nation-state. It is quite obvious that the multi-ethnic groups have lived together within the boundaries of most of the modern nation-states.

Different models of accommodations developed between the majority ethnic groups and the minority ethnic groups within the boundaries of a nation-state. There are several alternatives that can be explored regarding the concept of ethnic self-determination. In Central-Eastern Europe, for instance, a significant number of the Jewish population has been living, particularly in Hungary and Russia, who survived the holocaust and their position is clearly not to claim any ethnic identity but rather to strive for complete assimilation. Assimilation of the Jewish population particularly accelerated during the Communist domination in the region. Jewish people changed their names; they avoided any identification of being Jewish; and they made all effort to fully assimilate into the national community all over Central-Eastern Europe. Assimilation for other national groups is not so obvious. However, the tendency is that if the ethnic minorities

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30 See generally, SOHN: *op. cit.*, 540–553.

31 BROLMAN: *op cit.*, 38–53.

are really mixed and have a smaller percentage in a particular territory, some trend of assimilation clearly can be observed.[32]

The ideal solution for the problem of ethnic minorities is the co-existence in a multi-cultural society. In the cosmopolitan setting of major cities in Central-Eastern Europe, this has been the prevailing approach to the problem. Even in the Yugoslavian tragedy, the capital of Bosnia-Sarajevo was one of the real multi-ethnic societies, where inter-marriage among Muslim-Bosnians, and Serb-Croatians was commonplace and twenty-eight percent of the population enjoyed inter-marriages and close relationships among the different ethnic groups.[33]

Turning now to the bigger issues in ethnic self-determination in Central-Eastern Europe, first, it has to be considered what other alternatives are feasible under the current international legal regime protecting ethnic minorities. Earlier, we discussed that in the inter-war period, the relative weakness of the treaty regime protecting ethnic minorities under the auspices of the League of Nations that actually collapsed on the eve of the second world war. There is really just recently a trend in the framework of the European Union and the Council of Europe to develop a new body of laws on protecting ethnic minorities, addressing the basic needs of the free use of their language, religion, and access to enjoy their national culture.[34]

The ideal solution would be to give a more precisely defined body of international law for protecting ethnic minorities and building a real, effective institutional framework on the observation and implementation of minority rights.[35] Perhaps the existence of such a system would have prevented the tragedy of the Yugoslavian civil war which lead to ethnic cleansing, genocide, and other unprecedented crimes against humanities in resolving the problem, which was not properly treated or addressed under the current body of public international law. At the least, the people in Bosnia-Herzegovina, as well as in Kosovo, clearly have no faith and no reliance on protection under public international law of their minority rights for preservation of their national culture, language, and other basic phenomena of existence.[36]

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32 KYMLICKA: *op. cit.*, 80–85.
33 *Id.* at 86–87.
34 *Id.* at 88–89.
35 KRESOCK: *op. cit.* 207.
36 *Id.* at 208.

IV. International Legal Framework for Ethnic Self-Determination

In this context, we should discuss the protection of ethnic groups to achieve their internal right or potentially the feasibility of external right of self-determination. The idea of national self-government speaks of groups determining the character of their social and economic involvement, their fortunes, the course of their development, and the fortunes of their members by their own actions. The first question is: What groups qualify for the right to exercise self-determination? The group should have a common character and common culture that encompasses many, varied, and important aspects of life; a culture that defines or marks a variety of forms or styles of life, types of activities, occupations pursued, and relationship.[37] The membership in the group is a matter of mutual recognition. The membership also involves self-identification and reflects a manner of belonging. The membership is not exclusive and many people belong to several groups that answer to this description.

The groups of the defined ethnic minority has a historical occupation or particular territory, which can be a certain unit within a federal state or can basically be just one particular territorial unit as a province or a smaller territorial division.[38] The struggle for self-determination to lead to external recognition of forming a new sovereign entity received an impetus on the United Nations Charter and, in particular, led to recognition of the liberation of people under the Colonial domination in the early 1960's and 1970's and also people under military occupation like the Palestinian people in the Middle East. They recognized the right to struggle for external self-determination eventually leads to recognition of their statehood.[39]

The contemporary international community consist is quite reluctant to extend the right of self-determination for ethnic minorities living within the boundaries of a multi-ethnic nation-state whether they are unitary or federal systems. The danger of disintegration and secession, and the threat of violence and de-stabilization, led to the unanimous understanding that self-determination of an ethnic minority, having a certain majority in a particular territory unit, is not recognized under current international law.[40]

There is a notion of drawing a distinction between internal and external self-determination. An internal self-determination essentially protects a defined ethnic

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37 KOVÁCS: *op. cit.* 36–41.

38 *Id.* at 43–45.

39 CASSESE, A.: *Self-Determination of Peoples—A Legal Reappraisal*, 1995, 214–218.

40 *Id.* at 315–319.

minority within the territory which receives well-defined rights of constitutional democratic protection of all their minority rights. This legal foundation is enshrined in the gradual development of the body of human rights, particularly following the European model.[41]

Internal self-determination essentially means that a minority can develop a certain level of autonomy which starts on the level of cultural autonomy preservation of the cycling characteristics of the linguistic and educational as well as the religious traditions and all other aspects of the national culture. Usually there is a trend, which more or less became the boiling and unsettled issue in the Kosovo crisis, assessing the viability of an external self-determination of a very defined ethnic group under territory whose internal self-determination was denied.[42] Its fundamental minority rights would be disregarded by an oppressive regime.[43] Under these exceptional circumstances, there is a possibility for this ethnic minority, having the historical majority on a certain territorial unit of the nation-state, reach external self-determination or sovereignty.[44] However, this is not a settled norm of international law and it is not well recognized in the Kosovo conflict, at least at the time of writing this note.[45] There are destabilizing aspects of external self-determination which lead to the collapse of the nation-state system which have to be closely monitored and balanced against the fundamental denial of group minority rights within a certain nation-state.

In the light of the Kosovo conflict, new norms of customary international law have been emerging promoting the crystallization of rules on internal self-determination of peoples of a sovereign state. Traditionally, the international community expressed a very cautious approach in recognizing internal self-determination of ethnic minorities living within the boundaries of a sovereign nation-state.[46] It is evident that the political underpinning of this position is the fear that minorities, by invoking self-determination, might claim a right of secession. This is because self-determination is still primarily conceived of as a means for achieving independent statehood.

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41 KOVÁCS: *op. cit.* 63–70.

42 *Id.* at 72–74.

43 For a survey of the various views on this issue, see LERNER: *Rights and Discrimination in International Law*, 15–16.

44 CASSESE: *op. cit.* 359–364.

45 *Id.* at 365.

46 BROWNLIE, I.: The Rights of Peoples in Modern International Law, in the *Rights of Peoples 5* (James Crawford ed., 1988).

The current crisis in Kosovo can lead to the reassessment of the absolutist concept of self-determination. While self-determination for an ethnic minority is still divisive by its very nature, it would still mean a contest for power, control and authority. However, if a right to self-determination also meant something less than a legal right to sovereignty, the concept can be reassessed as an iron shield protection against gross violation of minority rights.[47]

The Kosovo experience at the end of the second millennium should be treated as the first XXIst century international approach to ethnic self-determination. From the vantage point of internal self-determination, the effective protection of the ethnic minority should focus on the fine-tuning of the needs of the particular ethnic minority. Essentially, it is for the minority group to declare what type of protection it seeks: autonomy, regional self-government, cultural autonomy, participation in the national decision-making process, and so on.[48] In this context, self-determination basically means the right of the population concerned to freely express its wishes about its destiny. The minority group should participate in the decision-making process of the national central authority.[49]

V. Final Remarks

The threshold question under contemporary international law is how to effectively implement protection of minority rights without an effective international central authority for this purpose.

Thus, at the current stage of the relative weakness of the international institutional framework, the optimum approach should focus on internal self-determination of ethnic minorities without undermining the territorial integrity and the political stability of sovereign states. The present legal regime for the international legal protection of minority rights is certainly weak and insufficient. Perhaps the whole Yugoslavian civil war and ethnic cleansing could have been avoided if such a regime would have been firmly established.[50]

Ethnic minorities should have the right for preservation of their separate identity. Any form of forced assimilation should be effectively prevented by

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47 FRENCH, Th. M.: Postmodern Tribalism and the Right to Secession, in *Peoples and Minorities in International Law* 4 (Catherine Brolmann, René Lefeber and Marjoreine Zieck eds., 1993).

48 CASSESE: *op. cit.* 232–295.

49 *Id.* at 317–319.

50 *Id.* at 325–328.

developing an internationally guaranteed constitutional framework enabling members of minorities to enjoy their own culture, to speak their own language, to practice their own religion, and so on. At the same time, states should grant constitutional participatory rights to them, guaranteeing their participation in the national decision-making process. This process would allow the particular ethnic group to fully integrate into the national, political, and power structure on a national and local level while, at the same time, maintaining and developing their own identity.[51]

Ethnic minorities located in specific territorial areas should be allowed to set up regional and local governmental structures endowed with legislative and enforcement powers in local police and security matters, social services, culture, and education.[52] The movement for extensive personal and territorial autonomy in the form of self-government, however, has been resisted by most of the national governments in Central-Eastern Europe, particularly since the second world war.[53]

Yugoslavia before 1989 offered a relatively effective ethnic self-government model, as ethnic Albanians in the Kosovo province and ethnic Hungarians in the Vojvodine province enjoyed extensive cultural and territorial autonomy.[54] In the midst of an escalating economic and political crisis in 1989, the autonomy of these provinces was abolished. Consequently, ethnic communities in the disintegrating federal systems felt quite insecure. In 1991, the EC Peace Conference on Yugoslavia placed great emphasis on the effective protection of the ethnic minorities in the newly created states of Bosnia and Croatia under international law.[55] Thus, this focus on minority rights reflects the continuous rejection by the international community to recognize the external ethnic self-determination which would undermine the sovereign nation-state system.[56]

The concept of external ethnic self-determination requires a careful reassessment in the light of the Kosovo tragedy. The unprecedented ethnic conflict raises intriguing questions under an emerging new regime for the international protection of ethnic minorities within the sovereign nation-state system, such as:

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51 KOSKENNIEMI, M.: National Self-Determination Today: Problems of Legal Theory and Practice, 43 *International and Comparative Law Quarterly*, 241, 250 (1994).

52 *Id.* at 253.

53 CASSESE: *op. cit.* 339–343.

54 *Id.* at 268–273.

55 *Id.* at 272.

56 *Id.* at 273.

1. the precise criteria of gross oppression of basic minority rights which bars the internal self-determination,

2. can lead to the internationally recognized right for external self-determination of minorities situated in a geographically coherent area of a nation state, and

3. the new set up of international institutions for dispute settlement and conflict resolution in the struggle of external ethnic self-determination.[57]

The tragic Kosovo experience at the end of the second millennium should lead to a careful reassessment of the role of the United Nations security system in the post-Cold War ethnic conflicts. Half a century of neglect of the complex area of ethnic self-determination should be addressed by the invisible faculty of international legal scholars.

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57 *Id.* at 363–365.

ACTA JURIDICA HUNGARICA
2000 41 Nos 1-2, pp. 17-25

1216-2574 / 2000 / USD 5.00

Csaba VARGA

Philosophy of Law in Central and Eastern Europe: A Sketch of History

Central and Eastern European philosophy of law started its independent life in the second half of the last century by developing its identity and gradually distinguishing itself from the trends prevailing in the region, mainly German and Austrian ones, but also from the French and Italian influence. Its formation bore the imprints of natural law, dominant in Europe at the time and in Central Europe primarily transmitted through Anton Martini's book on the principles of natural law,[1] as well as of Immanuel Kant's and Georg Wilhelm Friedrich Hegel's philosophy. Under the guise of natural law, currents actually competed with each other, ranging from the conservative actions of the Church to enlightening secularization, from feudal patriarchalism to contractual theories (designed for confirming or rejecting privileges), from the refutation of the *ius resistendi* to the approval of revolutionary republican ideas, or from the political use of a Christian natural law to launching the fashionable science of the law of reason (called *Vernunftsrecht*).[2] By that time, national languages had already gained ground in legal philosophy,[3] replacing Latin and German. For the contemporaries, Hegel

1 MARTINI, K. A.: *Erklärung der Lehrsätze über das Naturrecht*, Vienna, 1787.

2 PAULER, T.: *Észjogi alaptan* (Grundlehre des Vernunftsrechts), Pest, 1854.

3 E.g. in Hungary by SZ. SZILÁGYI, J.: *Természeti törvénytudomány* (Science of the law of nature), Máramarossziget, 1813.

was the main symbol of philosophical protest against officialdom. He was somewhat opposed to the German historical school of law (with Gustav Hugo's textbook on natural law in 1798 as the first expression of the kind), being distinguished from the former by its respect for the past.

In Central Europe, the last decades of the century signalled the formation of a positive social theory based on the ideal of science. As local variations, an artificially built view of history, rooted in the early developments of historical jurisprudence, took shape within its framework (e.g., Ágost Pulszky's reconsideration of Sir Henry Maine's *The Ancient Law* attached to his Hungarian translation published in 1875,[4] or Jivojina Peric's evolutionism published in Serbia in 1908[5]), just as the simplistic materialist theory which reduced law to the act of comprehension (e.g., Julius Pikler in Budapest in 1897[6]). Perhaps the most successful and lasting theory was the psychological theory of law by Leo N. Petrazycki, professor in St. Petersburg at the time, which, reasoning on the motives of human behaviour, based its explanation on the individual legal consciousness as a phenomenological fact.[7] The reaction was just as varied, like the flat refutation by arguments of natural law (e.g., Alexander Esterházy in Kaschau in 1897,[8] or Tomás Garrigue Masaryk, professor in Prague at the time, according to whose work published in 1900, natural law has to be taken as an ethical maximum to be transformed into positive law as an ethical minimum[9]), or the realization of the need for reconciliation between positivism and moral considerations (e.g., Felix Somló in Budapest in 1910[10]). It is not by mere chance that Rudolf Stammler's theory of "just law" from 1902[11] became the division line, and the recognition of its unsustainability provided inspiration for seeking refuge either in

4 PULSZKY, Á.: *Jegyzetek* (Notes), in: MAINE: *A jog őskora* (The Ancient Law), Budapest, Magyar Tudományos Akadémia, 1875. 325–443.

5 J. Peric's look at the evolutionist school in jurisprudence (1908).

6 PIKLER, J.: *A jog keletkezéséről és fejlődéséről* (On the emergence and development of law), Budapest, 1875.

7 PETRAZYCKI, L. N.: *Law and Morality*, Cambridge (Mass.), Harvard University Press, 1955.

8 ESTERHÁZY, S.: *A bölcseleti jogtudomány kézikönyve* (Textbook of philosophical jurisprudence), Vols. I–II, Kassa, 1897.

9 T. G. Masaryk on natural law and historical law (1900).

10 SOMLÓ, F.: Masstäbe zur Bewertung des Rechts. *Archiv für Rechts- und Wirtschaftsphilosophie*, 1910, Vol. III, 508–522 & 589–591.

11 STAMMLER, R.: *Die Lehre von dem richtigen Rechte*, Berlin, Guttentag, 1902.

axiology or in logical formalism (e.g., V. A. Saval'sky in Moscow in 1908,[12] Julius Moór in 1911 and Felix Somló in 1914, both in Hungary,[13] P. Georgescu in Romania in 1939[14]). This is why laying the philosophy of the science of positive law on the value-free foundations of jurisprudence became a need of primary importance again, following the patterns of two classical thinkers of the era, John Austin in London (and his magisterial work from 1861) and Karl Bergbohm in Leipzig (and his magisterial work from 1892), by Somló in Hungary in 1917.[15]

Farther East, in the region dominated by the Byzantine heritage, the orthodox variant of natural law represented the ideological framework. From the beginning of the nineteenth century, however, rivalling positions became more and more feverishly formulated within it, spanning from Kantianism[16] to Hegelianism,[17] from Italian-inspired national self-assertion[18] to positivism[19] in Romania, from the ascetic mysticism of V. S. Solovyev, reminiscent of early Christianity,[20] to Lev Tolstoy's cry against violence.[21] In Russia proper, philosophy of law became accepted only in the last few years of the nineteenth century. The textbooks of N. M. Korkunov and P. Redkin on the history of legal philosophy

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12 SAVAL'SKY, V. A.: *Osnovi filosofii prava v nauchnom idealizma marburgskaya shkola filosofii: Cohen, Natorp, Stammler i dr* (Foundations of legal philosophy in the scientific idealism of the Marburg school of philosophy), I, Moscow, 1908.

13 MOÓR, J.: *Stammler "Helyes jogról szóló tana"* (Stammler's doctrine on right law), Budapest, Pfeifer, 1911. and *A jog fogalma és az anarchizmus problémája Stammler jog-philosophiájában* (The notion of law and the problem of anarchism in Stammler's legal philosophy), Budapest, 1911., as well as SOMLÓ, Bódog: *A helyes jog elméletéről* (On the theory of right law), Kolozsvár, 1914, Erdélyi Múzeum Egyesült jog- és társadalomtudományi szakosztálya.

14 GEORGESCU, P.: *Conceptul si idea dreptului în doctrina lui R. Stammler* (Concepts and ideas of law in R. Stammler's doctrine), Bucuresti, 1939.

15 SOMLÓ, F.: *Juristische Grundlehre*, Leipzig, Meiner, 1917 and 2nd ed. 1927 (reprint by Aalen, Scientia 1973).

16 KUNITZYN, A. P.: *Pravo estestvennoe* (Natural law), Sanktpeterburg, 1818.

17 NIEWOLIN, K. N. in the volume II (history of legal philosophy) of the encylopaedia of jurisprudence (Kiev, 1839), according to whom law is "the expression of justice, actualising godly existence in the world of morality."

18 BARNUTIU, Simeon: *Dreptul natural privat* (Private natural law), Iasi, 1868, and *Dreptul natural public* (Public natural law), Iasi, 1870.

19 MISSIR, P. on legal philosophy and natural law (1904).

20 SOLOVYEV, V. S. on law and morality (1897).

21 IL'YN, I. A. on Tolstoy as against communism (1910), Ponyatie prava i sili. (Notions of law and coercion) *Vopros filosofii i psikhologii*, 1913, 101.

in St. Petersburg,[22] as well as the ones of P. I. Novgorodtzev and E. N. Trubetzkoy on natural law in Moscow,[23] exerted the main influence by their repeated editions. A regional turning point in how to think in legal philosophy was provoked by the discussions related to Savigny's work and the historical school of law (e.g. U. Kollotay in Poland, a number of Serbs, Novgorodtzev publishing in 1896,[24] as well as A. Tamosaitis, publishing in 1929 in Lithuania). As to the trends born in Russia, the discussion of V. S. Solovyev's teaching done on law and morality in 1897[25] and Petrazycki[26] (by Venelin Ganev in Sofia from 1914,[27] J. Lande in Krakow from 1916, and E. Bautro in Warsaw from

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22 KORKUNOV, N. M.: *Lekcii po obshchey teorii prava* (Lectures on the general theory of law), 1887; on decree and law (St. Petersburg, 1894); *Istoriia filosofii prava* (History of legal philosophy), five editions until 1908; REDKIN, P.: *Iz lekcy po istorii filosofii prava i sviazi iz istoriey filosofii vo'obshche* (From the lectures on the history of legal philosophy with a look at the history of philosophy in general), St. Petersburg, seven editions between 1889 and 1891.

23 NOVGORODTZEV, P. I.: *Istoriia novoi filosofii prava: Nemetzkiie ucheniia XIX veka* (History of the new legal philosophy: German teachings in the 19th century), Moscow, 1898, 2nd ed.: Moscow, 1899; *Kant i Hegel v ih ucheniyah o prave i gosudarstve: Dva tipichnikh postroeniia v oblasti filosofii prava* (Teachings of Kant and Hegel law and state: Two typical trends in legal philosophy), Moscow, 1901; *Ucheniia novogo vremeni XVI–XVIII. v.: Lekcii po istorii filosofii prava* (Teachings of the new era in 16th to 18th centuries: Lectures on the history of legal philosophy), Moscow, 1901, *XVI–XIX. v.* (16th to 19th centuries), Moscow, Knizhnoe delo 1904; Moscow, I. Vlassov, 1910, 2nd ed.: 1912, *XVI–XVIII. v. i XIX. v.* (16th to 18th and 19th centuries), 4th ed., Moscow, Vüszsaja Skola, 1918; TRUBETZKOY, E. N.: *Istorii filosofii prava drevnei* (The history of legal philosophy: ancient), Kiev, 1899, *novoi* (new), Kiev, 1898, *noveishei* (modern), Kiev, 1896.

24 NOVGORODTZEV, P. I.: *Istoricheska shkola yuristov ee proizhozhdenia v sudba: Oput kharakteristiki osnov shkolu Savigny v ih sosledovatelnom razvitii* (The historical school of jurists, their achievement and assessment: characteristic traits of Savigny's school in its subsequent development), Moscow, 1896.

25 NOVGORODTZEV, P. I.: *Ideia prava v filosofii V. S. Szolovyeva* (The idea of law in V. S. Solovyev's philosophy), Moscow, 1901 and JASHTSHENKO, A. S.: *Filosofiia prava Solovyeva* (Solovyev's legal philosophy), St. Petersburg, 1912.

26 TRUBETZKOY, N. N.: Filosofia prava prof. L. I. Petrazhitzkogo. (Prof. L. I. Petrazycki's philosophy of law), *Voprosu filosofii i psikhologii* 1901/2, 9–34 and REISNER, M. A. (1908) in Moscow, PALIENKO, N. (1908) in Harkov, as well as GANEV, Venelin: Imperativno-atributivnata teoriia na prof. Petrazhitzk. (Prof. Petrazycki's imperative-attributive theory), *Spisania na Yuridicheskoto druzhestvo*, II, 1904, 6 & 10.

27 GANEV, V.: *Kurs po obshcha teoriia na pravoto* [1921], 4th ed., revised by Neno Nenovski, Sofia, 1995.

1925[28]) became the crystallizing point, determining the further development of legal-philosophical thought. In addition to this Eastern European variety, the wave of scholars from the Balkans, getting their doctorate degrees in law in Paris before the first world war must also be mentioned, which, relying mainly on François Gény's revolutionary work (*Méthode d'interprétation et sources en droit privé positif*), became a school-generating example also for interwar Romania and Serbia (by, e.g., Mircea Djuvara in 1913,[29] and Jivan Spassoyevitch in 1911,[30] respectively).

The years preceding the first world war signalled the launching of the so-called Vienna-school in mastering and spreading philosophical positivism (issuing the journal *Zeitschrift für öffentliches Recht* from 1921 on), and Hans Kelsen's concept of the 'pure theory of law' grew into an international trend (by S. Rundstein in Poland,[31] Leonidas Pitamic in Slovenia,[32] Vojtech Tuka in Slovakia[33]). Almost simultaneously, a school in Brno was formed (with their own journal *Internationale Zeitschrift für Theorie des Rechts / Revue internationale de la théorie du droit* from 1926[34]) by Frantisek Weyr, author of the 'normative theory' based upon Schopenhauer's early concept of sufficient reason,[35]

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28 LANDE, J. on norm and phenomenon of law (Krakow, 1925); BAUTRO, E. on feeling of law as the symptom and form of unconsciously abbreviated thought (Warsaw, 1925) and Die Idee der Totalität in der Philosophie und Rechtstheorie. *Internationale Zeitschrift für Theorie des Rechts*, 1928–1929, Vol. 3, 156–194.

29 DJUVARA, M.: *Le fondement du phénomène juridique: Quelques réflexions sur les principe de la connaissance juridique*, Paris, 1913.

30 SPASSOYEVITCH, J.: *L'Analogie et l'interprétation*, Paris, 1911.

31 RUNDSTEIN, S. on legal interpretation and science of law (Warsaw, 1916) and on the structure of law (Warsaw, 1937).

32 PITAMIC, L.: Denkökonomische Voraussetzungen der Rechtswissenschaft. *Österreichische Zeitschrift für öffentliches Recht*, 1917–1918, Vol. 3, 339–367; Zur neuesten Rechtskraftlehre. *Zeitschrift für öffentliches Recht*, 1923–1924, Vol. 4, 160–164; *Drzava*, Ljubljana, 1927 and *Zur Lehre von der richterlichen Funktion* (in *Gesellschaft, Staat und Recht: Festschrift für Hans Kelsen*, Wien, 1931, 295–308).

33 TUKA, V.: *Die Rechtssysteme*, Berlin & Vienna, 1941.

34 Cf. KUBEŠ, V.—WEINBERGER, O. (eds.): *Die Brünner rechtstheoretische Schule*, Wien, 1980.

35 WEYR, F.: La théorie normative. *Rocenka právnické fakulty Masarykovy university* 1925, Vol. IV, No. 3; *La notion de "Processus juridique" dans la théorie du droit* (in: *Studi filosofico-giuridici dedicati a Giorgio del Vecchio*, Modena, 1931); Natur und Norm. *Revue internationale de la théorie du droit*, 1931–1932, Vol. VI, No. 12; Die Rechtswissenschaft als Wissenschaft vor Unterschieden. *Archiv für Rechts- und Sozialphilosophie*, 1935.

Jaroslav Kallab, a student of Windelband's and Rickert's axiology,[36] as well as Jaromír Sedlácek[37] and Karel Englis.[38] After the first world war, phenomenology and the analytical interest in aprioristic-deductivist realism also demanded ground (in the oeuvre, e.g., e.g. N. Alexeev in Russia from 1918[39] and Czeslaw Znamierowski at Poznan from 1921[40]). Yet, the interwar period was mainly shaped by generations which undertook the critical reconsideration of Kelsen's 'pure theory of law', i.e., Djuvara, as a neo-Kantian eclectic critical idealist in Bucharest,[41] Ganev, analyzing normative concepts as ideological tools for shaping future in Sofia,[42] Moór, trying to reconcile positivism and natural law in Budapest,[43] as well as Djordje Tasic in Belgrade,[44] Ceko Torbov, a student

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36 KALLAB, J.: L'oggetto della scienza guiridica. *Rivista internazionale di filosofia del diritto*, 1922, Vol. 2, 14–22 and Le postulat de justice dans la théorie du droit. *Revue internationale de la théorie du droit*, 1926–1927, Vol. 1, 89–99.

37 SEDLÁCEK, J.: Interprétaton et application de la règle de droit. *Revue internationale de la théorie du droit*, 1932–1933, Vol. 7, 180–185 and Il concetto realistico ed il concetto normologico della norma giuridica. *Rivista internazionale di filosofia del diritto*, 1933, Vol. 13, 153–174.

38 ENGLIS, K.: *Apologia finalitatis*, Prague, 1946.

39 ALEXEEV, N. on introduction to the study of law (1918) and to the foundations of legal philosophy (1923), and on the creative judicial act as the primary source of the law (1934).

40 ZNAMIEROWSKI, Cz. on subject and social fact (1921) and psychological theory of law (1922).

41 DJUVARA, M.: La théorie de la cause à la lumière de la théorie du Droit. *Revue internationale de la théorie du Droit*, 1932, Vol. 6, Nos. 2–3, 91–105; Relatività e diritto, à proposito del parallelisimo fra la struttura logica del mondo fisico e quella del mondo giuridico. *Rivista internazionale di Filosofia del Diritto*, 1935, Vol. 15, No. 3, 309–327; *Considération sur la connaissance en général et sur la connaissance juridique en particulier* (in: *Annuaire de l'Institut*, 1935/1936, Vol. 2, 83–96); Dialectique et expérience juridique. *Zeitschrift für Theorie des Rechts*, 1938, Vol. 12, No. 4, 295–315; *Considérations sur la structure de la connaissance morale et juridique*, Bucharest, 1940; L'idée de convention et ses manifestations comme réalités juridiques. *Archives de Philosophie du Droit*, 1940, 110–158; Über das Verhältnis des Rechtserkenntnis zur soziologischen Erkenntnis. *Zeitschrift für deutsche Kulturphilosophie*, 1942, Vol. 9, No. 1, 39–45.

42 GANEV, V.: *Kurs po obshcha teoriia na pravoto: Uvod: Metodologiya na pravoto*, (1921; 1932; 1933; 1946), re-ed. & preface Neno Nenovski, Sofia, Akademichna Izdatelstvo "Prof. Marin Drinov", 1995.

43 MOÓR, J.: Das Logische im Recht. *Internazionale Zeitschrift für Theorie des Rechts*, 1928, Vol. II, No. 3, 157–203, *Reine Rechtslehre, Naturrecht und Rechtspositivismus* (in: VERDROSS, A. (ed.), *Gesellschaft, Staat und Recht: Festschrift gewidmet Hans Kelsen zum 50. Geburtstage*, Wien, 1931, 58–105), Creazione e applicazione del diritto. *Rivista Internazionale di Filosofia del Diritto*, 1934, Vol. XIV, No. 6, 653–680, Recht und Gewohnheitsrecht. *Zeitschrift für*

of Leonard Nelson on Kantian natural law in Sofia,[45] Eugeniu Sperantia, an idealist in Cluj,[46] Vladimír Kubeš, a disciple of Nicolai Hartmann in Brno,[47] and József Szabó, undertaking to rationalize the irrational at Szeged.[48] As a counter-effect to the rigour of the purist defence against methodological syncretism, a number of synthetic philosophies were also born (e.g., by Toma Zivanovic in Serbia from 1927,[49] Horváth's synoptic view from 1936[50] with István Bibó in Szeged, as well as István Losonczy's neurophysiological realism at Pécs.[51]

This flourishment was brought to an abrupt end by the Soviet Union, as the real winner of the second world war, imposing its own regime on the region. With the liquidation of P. I. Stutshka, M. A. Reisner and E. B. Pashukanis, A. J. Vishinsky's 'socialist normativism', formulated in 1939, could no longer provide considerable developments for legal-philosophical thought. Although the entire region was destined to share the same fate,[52] the tradition of analytical linguistico-logical theorizing in Poland proved to be strong enough to survive

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öffentliches Recht, 1935, Vol. XIV, No. 5, 545–567, Der Wissenschafts-Character der Jurisprudenz. *Zeitschrift für öffentliches Recht*, 1941, Vol. XX, No. 1, 20–37.

44 TASIC, D.: Le réalisme et le normativisme dans la science juridique. *Revue internationale de la théorie du droit*, 1926–1927, Vol. 1, 165–182 and 1927–1928, Vol. 2, 23–56.

45 TORBOV, C.: *Filosofiia na pravoto i yurisprudentziia* (Philosophy of Law and Jurisprudence), Sofia, 1930 and *Osnovniat printzip na pravotov: Pravo i spravedlivost* (Fundamental Principles of Law: Law and Justice), Sofia, 1940, as well as *Estestveno pravo i filosofiia na pravoto* (Abstract: TORBOV, Z.: Naturrecht und Rechtsphilosophie. 92–107), Sofia, Universitetska Pechatnitza, 1947.

46 Cf. his Basic principles of legal philosophy (Cluj, 1936) and *Introduction to legal philosophy*, Cluj, 1946.

47 From the syntheses of his late years, see *Grundfragen der Philosophie des Rechts*, Wien & New York, Springer, 1977; *Ontologie des Rechts*, Berlin, Duncker & Humblot, 1986; *Theorie der Gesetzgebung*, Wien & New York, Springer, 1987.

48 SZABÓ, J.: A jogászi gondolkodás bölcselete (The Philosophy of the Juristic Thought), *Acta Universitatis Szegediensis: Sectio Juridica-Politica*, Tom. XVI Fasc. 2 (Szeged, 1941).

49 On the system of a synthetical philosophy of law (Belgrade, 1927).

50 HORVÁTH, B.: *Rechtssoziologie*, Berlin-Grunewald, Verlag für Staatswissenschaften und Geschichte, 1934 (ARSP Beiheft 28).

51 BIBÓ, I.: Le dogme du "bellum justum" et la théorie de l'infallibilité juridique: Essai critique sur la théorie pure du droit. *Revue Internationale de la Théorie du Droit*, 1936, Vol. X, No. 1, 14–27 and Rechtskraft, rechtliche Unfehlbarkeit, Souveränität. *Zeitschrift für öffentliches Recht*, 1937, Vol. XVII, No. 5, 623–638; LOSONCZY, I.: Über die Möglichkeit und den Wissenschaftscharakter der Rechtswissenschaft. *Zeitschrift für öffentliches Recht*, 1937, Vol. XVII, No. 2, 145–194.

52 Cf. VARGA, Cs. (ed.): *Marxian Legal Theory*, Aldershot–Singapore–Hong Kong–Sydney, Dartmouth & New York, New York University Press, 1993.

with outstanding journals (as with *Archivum Juridicum Cracoviense* published from 1966 and *Studies in the Theory and Philosophy of Law* from 1986) and magisterial oeuvres (Kazimierz Opalek, Jerzy Wróblewski,[53] Zygmunt Ziembinski[54]). As for Hungary, less fortunate local traditions relied on neo-Kantianism, which could be easily swept away by Georg Lukács and his neophyte Muscovite comrades. Notwithstanding of devastating effects in the short run, the outcome grew into a scholarship with considerable historical and comparative interest, generating further reformist tendencies (with the journal *Acta Juridica*, starting in 1959), ending in an open-minded philosophizing on law in Marxism with social-theoretical—and, thanks to Lukács's late ontology of the social being, even ontological—pretensions (Imre Szabó,[55] Gyula Eörsi,[56] Vilmos Peschka). Marxist theories of law worthy of international attention were also formed in Serbia,[57] Czechoslovakia (especially Viktor Knapp) and Romania (*Revue roumaine des Sciences juridiques* (1956–)[58] and particularly Anita M. Naschitz[59]).

Today's endeavors, with the reintroduction of classical and contemporary trends from Western Europe and the Atlantic world, are mostly directed toward filling the vacuum left behind by the forced interruption of development. Identifying and reassessing national traditions are to meet the needs of contemporary synthesis and the necessity to reintegrate such neglected fields as natural law and, with theoretical foundations, the doctrinal study of law (*Rechtsdogmatik*). Sensibility toward philosophical issues and emphasis on

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53 WRÓBLEWSKI, J.: *The Judicial Application of Law*, ed. Zenon Bankowski & Neil MacCormick, Dordrecht, Kluwer, 1992.

54 ZIEMBINSKI, Z. (ed.): *Polish Contribution to the Theory and Philosophy of Law*, Amsterdam, Rodopi, 1987.

55 SZABÓ, I.: *Les fondements de la théorie du droit*, Budapest, Akadémiai Kiadó, 1973.

56 EÖRSI, Gy.: *Comparative Civil (Private) Law: Law Types and Law Groups, the Road of Legal Develoment*, Budapest, Akadémiai Kiadó, 1979.

57 LUKIC, R. D.: *Théorie de l'État et du Droit*, Paris, Dalloz, 1974.

58 Especially IONASCO, Tr.—BARASCH, E. A.: Les constantes du droit: Droit et logique. *Revue roumaine des sciences sociales*, Série de Sciences juridiques, 1964, No.2, 132–143.

59 NASCHITZ, A. M.—FODOR, I.: *Rolul practicii judiciare in formarea si perfectionarea normelor dreptului socialist* (The Role of Judicial Practice in the Formation and Perfection of the Norms of Socialist Law), Bucharest, Ed. Academiei, 1961 and NASCHITZ, A. M.: Wert und wertungsfragen im Recht. *Revue Roumaine des Sciences sociales*, Série de Sciences juridiques, 1965, No.1, 3–23 & Le problème du droit naturel à la lumière de la philosophie marxiste du droit. *Revue Roumaine des Sciences sociales*, Série de Sciences juridiques, 1966, No. 1, 19–40.

historical and comparative approaches will surely survive the forced encounter with Marxism. Hopefully the demand for interdisciplinary explanation (that is, an ontological reconstruction integrating macro-sociology, autopoietical systems-theory or cultural anthropology) can also survive as one of the characteristic traits and strengths of the Central and Eastern European philosophy of law.

ACTA JURIDICA HUNGARICA
2000 41 Nos 1-2, pp. 27-46

1216-2574 / 2000 / USD 5.00

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Union with Transylvania in 1848 and the Path Leading There

"Whoever the chancellor will be, it is inevitable to support him in realising the Union in principio"
(a letter by Baron József Eötvös to Imre Mikó; October 1860)

"I can assure you, gentlemen, I will never concede to the unification of Transylvania and Hungary"
(a statement by Emperor Francis Joseph I to the Rumanian delegation from Transylvania in the spring of 1861)

As it clearly can be seen from the above quotes, even before the Compromise (Ausgleich) of 1867, the agreement between the Hungarian nation and the Habsburg dynasty, the concepts of the Court in Vienna and the liberal political forces of Hungary were absolutely different on the constitutional relations between Hungary and Transylvania. To understand this sharp difference in opinions, one has to know about the historical background. At the same time, foreign politics had a significant role in the fact that the statements of Emperor Francis Joseph I had been forgotten by 1867. Among others, the Hungarians considered the confirmation of the legitimacy of the April Laws of 1848—which provided for the unification of Hungary with Transylvania—an important condition of the Compromise.

I. Time Span

It may seem a simplified statement, but the constitutional terms between Transylvania and Hungary can be illustrated with a sequence of dates. These

dates are: 1544, 1606, 1628, 1690, 1723, 1791, 1836, 1848, 1867. These dates sign the constitutional acts which were landmarks in the relationships between the two sides.

1. The date of 1544. in the history of Transylvania is considered as an important landmark, as this was the first provincial Diet of Transylvania where, beside the three nations of Transylvania, the delegates of the Tiszántúl's Hungarian comitats (later referred to as Partium) also participated.[1] Earlier, a sovereign Transylvanian province had not been mentioned. True, the above mentioned Diet, which was summoned by Governor György Fráter, was a necessary, although not direct consequence of the Turkish conquest, i.e. the country's falling into three parts. Thus, the creation of the state of Transylvania is the result of foreign political factors. Detailed research in the field has proved that a tendency of inner integration had started well before 1544. The Diet discussed here was merely the completion of this tendency.

1.1. One of the particular features of the medieval Hungarian state, even if viewing it with Western-European eyes, that separate provinces did not form. Before the Battle of Mohács in 1526, only the Croatian–Slovenian–Dalmatian regional governments can be mentioned as an example. The autonomous state or province of Transylvania was created in its aftermath. This fact is important, among other things, in the history of public administration, if one considers that in Hungary we still do not have regions as a part of a three-tier public administration system. Presumably, the reason can be found in the lack of the feudal regional governments. On the other hand, it cannot be denied that there were initiatives throughout the centuries, and such a regional government would appear or stabilise where a member of a reigning royal family had obtained powers for regional government. For example, the duke, later—in connection with the younger kingdom—the viceroy of Croatia, the viceroy of Macsó, János Corvin's dukedom of Liptó, the dukedom of Szepes imagined by the Szapolyai, or the Eastern-Hungarian regional government of the rex juniors. These forms of

1 HORVÁTH, M.: *Magyarország történelme* (The History of Hungary). Vol. IV. Pest, 1871. 196. The invitation to the Diet was sent on behalf of Queen Izabella. see: *Erdélyi Országgyűlési Emlékek* (Memories of the Transylvanian National Assembly) (ed. Sándor Szilágyi), Vol. I. Budapest, 1876. 122, 187–188. In the preamble law the delegates of the Diet are referred to as: "Per universitatem Dominorum et Nobilium Regni Transylvaniae et Hungariae Ditionis Majestatis suae." 188. To guarantee this, the annual session of the Diet of the feudal classes of Tiszántúl and Transylvania was ordered here in Torda: "Singulis annis celebrentur huismodi congregationes generales, omnibus ordinimus diconis Maiestatis suae tam Hungaris quam Transsilvanis." 190.

government are basically similar to the territorial sharing inside the royal families of Western-Europe, conventional at that time. Luckily for the medieval Hungarian state, these arrangements were not long-lasting.

In the second half of the XIIIth century, regional government—as a reminiscence of the dukedom of Bihar–Nyír—was created in Transylvania, as Béla IV, later his son, István V—as royal princes, during the reign of their fathers—got provinces here in the eastern part of the country. Probably, these territories were the *partes Transsilvanas*, the parts of Transylvania, and some other north-eastern counties.[2] After the royal family of the Árpáds died out, regional government as such got out of the vocabulary. This is also suggested by the consequent use of the word Chancellery. In charters one can come across only *Transylvanian parts*, i.e. the above-mentioned partes, but no reference to a province.[3] Transylvania was governed by three kinds of public administration units. These were the Hungarian comitats, the Szeklers (Székely) and the Saxonian provinces. Each of these was directed by a high-ranking regional royal official: the voivode in each of the seven Hungarian comitats; the *comes siculorum*, i.e. the Szeklers bailiff in the Szeklers provinces; the *comes saxonum*, the Saxonian bailiff in the seven and two Saxonian provinces.

It is worth noting the Szeklers bailiff was a rival of the voivode. Particularly after redrawing the borders during King Lajos the Great, further non-Szeklers territories got under the jurisdiction of the Szeklers bailiff. In the north, the comitats of Máramaros, Szatmár and Ugocsa; the district of Beszterce; in the south, Háromszék, Brassow and Barcaság were subject to the rule of the Szeklers bailiff.[4] Translated, it means they were responsible for the protection of the East-Carpathian borders. At the same time, the power of the voivode was also strengthened by obtaining the title of the Bailiff of Comitat Szolnok in the XIIIth century.[5]

It is also worth paying attention that church administration is not uniform in the whole *partes Transsilvanas*. The Bishop of Transylvania, who until 1918 had been officially called episcopus Transsilvanus, and not the Bishop of Gyulafehérvár after his see, had jurisdiction over the comitats and the Szeklers, but not

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2 KRISTÓ, Gy.: *Feudális széttagolódás Magyarországon* (Feudal Disunity in Hungary). Budapest, 1979. 48–49. SZIRMAY, A.: *Szatmár vármegye* (Comitat Szatmár). Vol. Buda, 1809. 39. WENZEL, G.: *Árpádkori Új Okmánytár* (New Collection of Records of the Árpád Era). Vol. VIII. Pest, 1872. 5–7. FEJÉR, Gy.: *Codex Diplomaticus*. Vol. 7/3. Buda, 1835. 41.

3 GYŐRFFY, Gy.: Gyulafehérvár kezdetei, neve és káptalanjának registroma (The Early Years of Gyulafehérvár, its Name and the Register of its Chapter). *Századok*, 1983. Vol. 5. 1113–1116.

4 LÁZÁR, M.: Erdély főispánjai (The Bailiffs of Transylvania). *Századok*, 1887, 1888, 1889.

5 PÓR, A.: Erdélyi vajdák (The Voivodes of Transylvaniya) (series). *Erdélyi Múzeum*, 1893.

the Saxonian. (N.B. the church administration system of the Saxonian dates back to the dynasty of the Árpáds). The Provost of Szeben was in charge of church administration on their territories, Fundus Regius and Királyföld. In Brassow and Barcaság it is the Dean of the Brassow Chapter to manage church administration. Both institutes of the Church are supervised by the Archbishop of Esztergom on behalf of the monarch till Reformation.[6] The comitats of Kraszna, Szatmár and Ugocsa, west of the Meszes Mountains were under the jurisdiction of the Transylvanian Bishopric. In the Middle Ages they were also referred to as the Vicarage of Meszes, an autonomous church unit. On the other hand, the Archdeaconry of Kalotaszeg was part of the Diocese of Várad; in secular administration, part of the Comitat of Bihar till 1544.[7]

This differentiated system of public administration well illustrates and also preserves the gradual integration of parts of Transylvania in the state organisation of medieval Hungary. At the same time, the lack of provincial autonomy, the result of disintegration can be clearly seen.

1.2. A significant shift in this differentiated system can be observed since 1440. Then, the King appoints János Hunyadi, Viceroy of Szörény to be the Voivode of Transylvania; while Lőrincz Ujlaki, Viceroy of Szörény is appointed the Bailiff of the Szeklers.[8] Through administration, particularly war administration the voivodes can oversee all Transylvania with the exception of the Saxonian. The explanation can be found in foreign politics. The Turks reached the southern borders at this time and the feudal provinces of the Transcarpathians became Turkish. Therefore, it was the task of the voivode to strengthen border defence and to co-ordinate war operations in the three parts, within the country borders.

The political integration of the country started when, in 1437. after defeating the peasant war, the leaders of the three parts, i.e. the three nations signed the so-called Kápolna Union.[9] Afterwards, it became a routine to summon a so-called partial Diet for the nations of Transylvania more and more often, presumably for the Turkish danger. Previously, the Court guaranteed this privilege only for the Croatian–Slovenian–Dalmatian territories. To sum it up, the three factors: personal Union of the posts of the voivode and the Szeklers bailiff; Kápolna Union as a provincial political pact; and the partial Diets together resulted in a

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6 ORTVAY T.: *Magyarország egyházi földleírása a XIV. század elején* (The Church Register of Land in Hungary at the Early 14th Century). Vol. I. 1891. 57–63, Vol. II. 1892. 607–768.

7 *Ibid.* Vol. II. 1892. 579.

8 HORVÁTH: *op. cit.* Vol. II. 1871. 545.

9 *Ibid.* 513.

process of gaining gradual independence in the parts of Transylvania. For Her to achieve the status of an autonomous province, later that of an independent country, further impacts of foreign politics, among them the acceleration of the Turkish conquest was necessary.

1.3. The development in this process is indicated by the fact that the widowed Queen Izabella moving from Buda to Transylvania in 1541, and her son, János Zsigmond, the elected king keep their title of Hungarian monarchs. The title of Prince of Transylvania is first mentioned only two decades later, in the Concordat of Speyer. It was not used systematically until 1594. Beside the Hungarian documents, the political statement of the Porte also proves the Turkish conquest had a significant role in the process of gaining independence in Transylvania. When Gábor Bethlen was forced by the Turks to return from his successful military expedition in the Upper Hungary (Felvidék), the senior mufti of the Sultan clearly stated to the Transylvanian delegate to the Porte they do not let Bethlen Gábor unite the conquested territories with Transylvania, in spite of him being the King of Hungary. They claimed Transylvania to be the possession of the Sultan.[10]

The independence of Transylvania from the Kingdom of Hungary is sanctioned in the Concordat of Speyer in 1570. Also, the Habsburgs recognised again the title of prince of Transylvania in 1595, after the marriage of Zsigmond Báthory with the Habsburg royal princess Maria Krisztierna.

1.4. From 1544 to 1604, the date of the Revolt of István Bocskai, the constitutional autonomy of Transylvania had been stabilised. A provincial identity seemed to appear, which later was referred to as transylvanism in general historiography.

Bocskai's political testament is a revealing document. This is interesting because on the one hand, Bocskai referred to Transylvania as his homeland; on the other hand, he regarded the independence of Transylvania from Hungary to be provisional. This well-known document stated that Transylvania's independence was necessary as long as the Hungarian crown belonged to the Germans.[11] This statement is significant because István Bocskai made it when he was the Governor of Hungary elected by the Hungarian feudal classes beside

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10 BORSOS, T.: *Vásárhelytől a Fényes Portáig* (From Vásárhely to the Sublime Porte). Bukarest, 1972. 394–395. Borsos quotes the senior mufti: "Even if István Bocskai had been the king, the sublime sultan would never have let him take possession of Transylvania."

11 BOCSKAI, I.: Testamentomi rendelés (Destination from the Testament). In: *Magyar gondolkodók, XVII. század* (Hungarian Thinkers, XVIIth century). Budapest, 1979. 14.

being the Prince of Transylvania. Although, when the Sultan sent him a crown, probably in acknowledgement of unification, Bocskai expressed his gratitude, but had it placed in his treasury. One can conclude that the common political opinion of the time still considered the division of the country provisional, despite the fact the Peace of Vienna concluded by Bocskai acknowledged the independence of Transylvania.

2. A big change took place in the reign of Gábor Bethlen. True, at the beginning he followed traditions in his policies, and confirmed the independence of Transylvania in peace treaties. After the death of his first wife, he had the intention of marrying a Habsburg royal duchess, and this new constitutional situation could have enabled Gábor Bethlen as Prince of Transylvania to be appointed the Governor of Hungary. As he could not fulfil these endeavours, he tried to arrange for the final and complete independence of Transylvania from Hungary. On the one hand, he initiated a new custom according to which the European Protestant states guaranteed the peace treaties of the Transylvanian princes with the Habsburgs. On the other hand, he tried to secure the Polish crown for himself. In 1628, being seriously ill and considering an imminent succession, he started to make arrangements for the Seven Comitats. He wanted to prevent them from being returned to the Habsburgs, and to keep them under the jurisdiction of the Transylvanian Prince. He suggested that the Seven Comitats should not be unified with Transylvania,[12] but György Rákóczi, as a governor should rule them.

As a peer in Upper Hungary, Rákoczi refused Bethlen's suggestion, but later as a reigning prince he seemed to consider this possibility. His testaments and political steps suggest so. He wanted his eldest son to inherit the Transylvanian estates and the title of Prince of Transylvania; and his other son, Zsigmond to inherit the Hungarian estates and the title of Governor of Hungary. It would be a long story to analyse the inner-, and foreign-political ideas underlying his will. Miklós Zrínyi also indicated Zsigmond Rákoczi as the potential successor to the Hungarian throne in his conception of a national kingdom. Zsigmond was also considered as the successor to the Polish throne. The Bethlen conception seemed to take root in the political thinking of Transylvania, and there were no intentions to integrate the two sovereign states even in the case of unifying Hungary.[13] In

12 HERCEGH, G.: *Magyarország külpolitikája* (The Foreign Policy of Hungary). Budapest, 1987. 142–148. KEMÉNY, J.: Önéletírása (Autobiography). In: *Kemény János és Bethlen Miklós művei* (The Works of János Kemény and Miklós Bethlen). Budapest, 1980. 95.

13 HERCEGH: *op. cit.* 150–154, PÉTER K.: *A magyar romlásnak századában* (In the Century of the Hungarian Depravation). Budapest, 1979. 68, 120–121.

spite of the Turkish control, the princes of Transylvania had good relationships with the western Protestant states, and joining the European Protestant Union, became an acknowledged and considerable factor on the political stage. Suffice it to refer to the territorial expansion of the principality and the international treaties concluded during the Thirty Years' War with the Swedish, the Polish, the French monarchs, and Holland.

3. The next landmark is 1690–1691 when the Habsburgs fighting off the Turks, occupied, then annexed the Principality of Transylvania. Diploma Leopoldinum, the document signed then and laying down the constitutional independence of Transylvania, determined the history of Transylvania until 1848.

In connection with its creation, at least three conceptions clashed. The earliest idea of the Court in Vienna might have been the unification with Hungary. Miklós Bethlen, the Transylvanian commissary who created the Diploma, remembered in his Autobiography that at first he was invited to accept the title of voivode of Transylvania, but he refused it.[14] At the same time the people of Transylvania wanted to preserve the autonomous Transylvania. They regarded Mihály Apafi (II), the immature prince as a guarantee to realise their aim. Also, through Protestant connections, they turned to England and Holland for mediation. Possibly as an answer, the Habsburg troops invaded the province, contractually provided for its financing, but they promised the status of the principality would remain pendant till the maturity of Mihály Apafi. Provisionally, a governor is appointed who governed with the Council of the Principality.

But the tactless political decisions of Transylvania (often prompted by selfish power struggles, e.g. the marriage of Mihály Apafi with the sister-in-law of the governor, without letting the court know) forced the court to stop the autonomy of this province and place Transylvania directly under its control. In vain did Miklós Bethlen try to redefine the conceptions concerning former freedom, and adapt them to the new situation, in his memoir, Noah's dove with the olive branch. This step resulted in his lifelong detention, as well as Mihály Apafi's internment in a palace in Vienna.[15] Another consequence was that the Habsburg Emperor as the King of Hungary became the Prince of Transylvania. Apparently, it was unity, as the Holy Crown entitled the monarch to rule in both countries, but with separate feudal assemblies, wielding power with a Hungarian and a

14 BETHLEN M.: Élete leírása magától (The Description of his Life by Himself). In: *Kemény János és Bethlen Miklós művei* (The Works of Kemény János and Bethlen Miklós). Budapest, 1980. 821.

15 BETHLEN, M.: Olajágat viselő Noé galambja (Noah's Pigeon with Olive Branch). In: *Magyar gondolkodók, XVII. század* (Hungarian Thinkers, XVIIth century). Budapest, 1979. 283–296.

Transylvanian Chancellery. Later, we are going to write about the foreign political motives behind this situation.

Therefore it is surprising that Ferenc Rákóczi II, during the Rákóczi War of Independence did not unite the two countries on purpose, although he had the political opportunity. He was elected and appointed the ruling prince of Transylvania and the commander of Hungary separately; he had separate councils and chancelleries for he two countries. The foreign political motives are clear, as long as the commander of Hungary could have been significant for the French Court, which regarded him as the military leader of the opposition of the Habsburgs in the East. On the other hand, he had a general reputation in European politics as the prince of Transylvania. It is also indicated by the fact that when he was considering his resignation as the commander of Hungary and offered the Polish throne, he did not think of renouncing as the prince of Transylvania, recognising the international weight of this post, especially after the Ottoman independence ceased.[16] (N.B. the feudal classes of the two countries did not wish unification, as the Huszti Confederation mentions the co-operation and not the unification of Transylvania and Hungary.)[17]

4. Afterwards, autonomous government in Hungary and Transylvania becomes steady. Thus, the Kingdom of Hungary is in personal-union with Transylvania, as well as with the Croatian–Slovenian–Dalmatian Kingdom. These provincial autonomies were further strengthened by the Transylvanian and the Croatian Diet. It is also worth mentioning the idea of Union did not come up either in the Szatmár Peace Pact, or in connection with Pragmatic Sanction *(Pragmatica Sanctio)*, despite the fact that both acts implied this possibility. Mihály Horváth, an excellent historian, in his work on the history of Hungary, writes Palatine Pálffy, who was loyal to the Habsburgs, suggested the Hungarians deserved something for accepting Pragmatic Sanction.[18] Finally, after a long

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16 RÁKÓCZI, F.: *Vallomások–emlékiratok (Confessions–Memoires)*. Budapest, 1979. 310–311, 354–355. HORVÁTH: *op. cit.* Vol. VI. 1872. 508–509, HERCEGH: *op. cit.*, 1987. 172–174, 184.

17 HORVÁTH: *op. cit.* Vol. VI. 1872. 605–

18 HORVÁTH: *op. cit.* Vol. VII. 1873. 112–113: calls and remarks of the palatine written to his protonotary István Szluha, who had been known as a supporter of Rákóczi, dated of 1722: "I wonder what we could claim for our success from our noble King..." further "...the succession will be proposed to the Court ... and the country should consider what concession to ask for." N.B. both the protonotary of the palatine and the protonotary of the cardinal, as well as Pál Ráday were suspicious at the Court of Vienna. They were supposed to obstruct the succession of the female line to the throne (112) The irony of history that Szluha was to propose and offer the bill of pragmatica sanctio to the Diet (121).

consideration, the interested parts asked the confirmation of the feudal privileges, and laying down of the legal term "indivisibiliter ac inseparabiliter". In spite of the ideological success of the Rákóczi War of Independence, the issue of union with Transylvania did not emerge.

5. Some change came only after the death of Maria Theresa. In the 1780s, Joseph II unified the Hungarian and the Transylvanian chancelleries in more steps. This meant the main organ of Transylvanian public administration, the Gubernium came under the jurisdiction of the uniform Hungarian Chancellery.[19] Although, this administrative unification did not result in a constitutional union between the two countries. The constitutional autonomy of Transylvania remained unchanged within the framework of the big Josephinian reforms in public administration.

6. After the death of Joseph II, the idea of the Union, as an offset of the starting national movement in Hungary, emerged again at the Hungarian Diet in Pozsony (Bratislava). Joseph II put off decision-making, saying he cannot decide without the Transylvanian Diet.[20] Then, the Hungarian comitats and the Szeklers supported the Union, but without success; the Saxonian expressed their protest well before the Diet, so this issue soon got out of breath.

Before 1848, the question of the Union[21] came up again in connection with the Partium revision, in the Diet of 1832–36. The final solution was not until 1848.

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19 HORVÁTH: *op. cit.* Vol. VII. 1873. 513: "The two chancellaries were in fact unified by the order dated of 14. Aug. 1782. This unified chancellary will be called either Hungarian or Transylvanian, depending on the country it administers for ... the Hungarian Chancellary organised in this way will be the highest government authority in each province of the Hungarian Crown, with the exceptional right to appeal to the ruling prince." See also: *Erdély története* (The History of Transylvania). Vol. II. ed.: László Makkai–Zoltán Szász. Budapest, 1986. 1099–1100. An interesting remark is that the State Council, part of central government, originally did not support the idea of unification, because they regarded it as the Union of Transylvania with Hungary. Instead, they suggested the Transylvanian Chancellary be subordinated to the Czech–Austrian Chancellary.

20 HORVÁTH: *op. cit.* Vol. VIII. 1873. 47, 137–138.

21 HORVÁTH, M.: *Huszonöt év Magyarország történelméből* (Twenty Fire Years from the History of Hungary). Vol. I. Genf, 1861. 346–353.

II. Transylvania in the Habsburg Monarchy

Transylvania within the Habsburg Monarchy can be studied in two aspects, i.e. its role in home, and foreign politics.

1. Without going into details about the constitutional status of Transylvania within the Monarchy, we would just refer to Diploma Leopoldinum and its later amendments which provided regulation. It is suggested, that in spite of the constitutional autonomy and independence from Hungary, the main tendency was gradual melting in the Empire, which had resulted in a quasi-perpetual provincial status by the first decade of the XIXth century. The obvious reason for this intention to merge was the political lesson, which the Ottoman Empire had also realised, that Hungary unified with Transylvania would acquire an economic and military–political potential which could challenge the Habsburg in a case of favourable foreign political circumstances, and might endeavour to regain independence. Not only the XVII-century military actions of the Transylvanian princes, but the Rákóczi War of Independence and the military events of the War of Independence of 1848–49 proved this political suspicion was not without reason.

All the circumstances mentioned above were favourable for melting. This process, which Rákóczi even hastened with his motion, did in fact start at the beginning of the 1700s. It is worth paying attention to the methods which Vienna used when trying to melt Transylvania. The list of these methods is very informative, even if the statesmen of the Court were not always careful about selecting the right methods. It is still not clearly defined whether it was the sometimes hesitant steps of the leaders of the Habsburg Monarchy, or the strength of the Hungarian (Hungarian and Transylvanian) feudal opposition which determined the outcome, i.e. the prevention of the Habsburg imperial unification ("Gesammtmonarchie").

1.1. The first restriction is in connection with renouncing the ruling power. Until the Diploma Leopoldinum, for the feudal classes of Transylvania, the main tools of restricting the royal powers were the definition of Electoral Conditions and oath-taking of the ruling princes, which were added to the most important Transylvanian codifications (Approbata constitutions, Compilata constitutions). They became meaningless after the Habsburg rule started. After sanctioning Pragmatic Sanction, Transylvania constitutionally became a hereditary prin-

cipality.[22] The monarchs ascending the throne would take an oath on keeping Diploma Leopoldinum, at most. The traditional method of creating constitutional pacts, the so-called conditions became out-of-date (N.B. it demanded from Ferenc Rákóczi II a lot of bargaining skill to sign such a pact), as in practice the Transylvanian Diet could do no more than accept the new monarch. It must be mentioned that in Hungary remain the oath-taking ceremony and the letter of credit as possible tools of limiting royal powers. It sometimes took months at the Diets to bargain over such a document with the Habsburg commissioners. At the Hungarian Diets in Pozsony (Bratislava), the tradition of crowning ceremonies survived even after Pragmatic Sanction. At the same time, in Transylvania the new monarch would just visit the province some years later, instead of being crowned the ruling prince in a traditional crowning ceremony.

1.2. The Diets became less significant. They are held, but can be summoned only by the monarch. In 1948, in lack of the royal order, the governor took the risk of summoning the Diet in fear of an even bigger danger. The membership of the Diet also changed in accordance with the wish of the leaders of the Monarchy. As against the Hungarian Diet, in Transylvania, beside the representatives of the comitats, the Szeklers provinces and the privileged towns, there was not a protocol concerning members to be invited. The monarch had the traditional privilege, dating back to the era of principality, to invite as many members as he wished to secure the votes he needed.[23] The Saxonian, who were gradually finding their German roots during the Habsburg rule, regularly and voluntarily joined this safe parliamentarian majority, and seemed to be steady and loyal supporters of the central government to secure their privileges. Similarly, at the end of the XVIIIth century, the bishops of the Orthodox Church, then already with certain privileges, started to represent the loyalty of their nation to central government.

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22 HORVÁTH: *op. cit.* Vol. VII. 1873. 106–109. Note Pragmatica sanctio was sanctioned in some other provinces well before it was sanctioned in Hungary in 1723. The line of succession itself was laid down by Charles III in 1713. Interesting that the Croatian, when probably informed about these royal plans, pronounced in their provincial assembly that the king of Croatia will be identical with the king of Austria, Stiria and Karintia, in March 1712, a year earlier than the declaration of Charles in 1713. In Transylvania, the female line of succession was sanctioned by the Diet of Szeben in September 1720.

23 TRÓCSÁNYI, Zs.: Az Erdélyi Fejedelemség korának országgyűlései (National Assemblies of the Age of the Transylvanian Principality). In: *ÉTT. Új sorozat* (ÉTT New Series). No. 76. Budapest, 1976. 24. HORVÁTH: *Huszonöt év... op. cit.* Vol. I. 1864. 427.

The membership of the Transylvanian Diet was constitutionally important because this was the authority which, according to the Diploma Leopoldinum, was to offer or appoint the senior public administration officials (governor, chancellor, treasurer, councillors of the government. Beside delegating representatives, the Habsburg Monarchy, of course, had a wide choice of opportunities to secure to the full its interests, for example, by summoning or postponing sessions, or appointing special commissioners to fulfil senior government positions.

1.3. Similarly, the monarch had many opportunities to exert his influence at the level of local authorities. While during the era of principalities, the Szeklers and the Saxonian could appoint their own senior officials, during Habsburg rule, it was the authority of the central government to appoint, and the comitats, the Szeklers provinces and the towns could only offer candidates. To offer candidates, the central government was to summon local authorities. Sometimes it was impossible to summon local officials because of vacancies in the offices, and these anomalies contributed to a silent reduction of local autonomies. Particularly the Metternich government used such methods during the so-called Francis reaction.[24]

1.4. Central government's most important tool of intervening in Transylvania was the troops stationed there (against neighbouring Turks). The commander of these troops, who was commanded by the War Council in Vienna, was a general based in Nagyszeben. As the contemporary Transylvanian parable had it, even the governor was a nobody compared with the General of Nagyszeben. The research of Zsolt Trócsányi revealed that during the reign of Maria Theresa, the major government offices of Transylvania were not filled for about a decade, and the Court tried to introduce military government throughout the province[25] Although the popularity of this endeavour was equivocal, probably, the reminiscence of this was the military border zone initiated by Maria Theresa. As a matter of fact, a feudal and archaic, but for the government a reasonably cheap method was used. The Szeklers of the border zone, the Rumanian of the Fogaras and Beszterce were organised into regiments of border defence and had to serve

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24 HORVÁTH: Vol. VIII. 1873. 528–532. Same author: *Huszonöt év... op. cit.* Vol. I. 1864. 347–350, 424–427.

25 TRÓCSÁNYI, Zs.: Kísérletek teljes katonai uralom létrehozására Erdélyben (Attempts to Initiate Comprehensive Military Rule in Transylvania). *Századok.* 1983. No. 5. 983–1011.

there in return for freedom of tax.[26] The resulting scandal, the peril of Mádéfalva are lavishly treated by many authors.

1.5. Here we would like to focus on the general tendency which was the consequence of creating the military border zone. The reign of Maria Theresa meant modernisation in the interest of the silent unification of the monarchy. A crucial element in it was territorial revision in the constituent countries. In Hungary, beside creating the border defence zone in the south, she also reformed the status of Fiume as a Corpus separatum. It was she who redeemed the towns in Szepes pawned by King Zsigmond. Transylvania was honoured the title of ruling principality[27] in 1765, in the malicious opinion of contemporaries, as a compensation for the lost Silesia. While the defence zone was not too large compared with the whole territory of Hungary, it was the one-third of the territory of Transylvania, i.e. these territories were under the direct military administration of Vienna.

Concerning the international aspects of the above said, we suggest that the ever 'rebellious' Hungarians were forced to surrender by the Court retaining the constitutional independence of Transylvania and melting it in the Empire. Slightly exaggerating, we could say then this was the price of constitutional autonomy in Hungary, as the military zone created around the country also served to prevent any deviation from the framework of this autonomy. The numerous ethnic minorities of Hungary were regarded as the second line of the defenders of the monarchy in case of a rebel. It is well-known they were a priority when Vienna considered support.

2. This problem leads to studying the international role of Transylvania. Even in connection with the creation of the military border zone, one is tempted to make comparisons with contemporary Europe. The two prototypes of contemporary European absolutism were the French and the Prussian.

2.1. The French, following the traditional Burgundian example, had a finance-oriented system of administration. They introduced the 'intendant' system which was a local financial administration accountable only to the central government. Consequently the intendant, a dependant of central government, was the ultimate arbiter in all local maters, while the traditional autonomies remained unchanged. It resulted in a system which enabled the government to control the whole country through financial administration, a neuter field.

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26 *Erdély története... op. cit.* Vol. II. 1027–1032.

27 HORVÁTH: *Magyarország történelme... op. cit.* Vol. VII. 1873. 348.

2.2. In contrast, the Prussian method, a military administration keeping control through local commissariats, originated from the Swedish, and spread after the Thirty Years' War. In this system, the local commissar is responsible for all branches of local government, as the whole state is supposed to serve the army. This Prussian method was so efficient that finally they managed to melt Brandenburg, Prussia and Pomerania—constitutionally three different states—into a new state, the Prussian Kingdom.[28] The Hohenzollern proved the superiority of the Prussian method in Central Europe when they occupied Silesia, an Austrian possession.

2.3. The Habsburg Government was experimenting with both methods of administration and decided for the French finance administration in the long run. Although, at hard times, and in the periphery of the country, they tried to adapt the Prussian military way, even as late as 1850, the defeat of the Hungarian War of Independence.

Meanwhile, the fight for national unity started well before the XIXth century in contemporary Germany. According to the international literature, the potential candidates in this process are Bavaria, Austria, Saxonia and Prussia.[29] For reasons not to be discussed here, Bavaria soon dropped out of the competition and Saxonia lost at the end of the XVIIIth century. Only Austria and Prussia remained to be considered. Similarly to Saxonia, they became powerful bordering on the German–Roman Empire, and both extended their territory, through occupying territories from neighbouring, weaker countries.

These 'preying' states could develop mostly unifying the newly-acquired territories. The classical example is Prussia which unified three countries. Something similar took place in Austria, but at a slower pace. After the Battle of Fehérhegy, they melted Bohemia, later they shared Dalmatia and Galicia of Poland. Apparently, Transylvania had to face the same lot in the XVIIIth century. (N.B. comparison with Croatia deserves a detailed analysis, as more than half of that country was border zone.) The only solution for Transylvania seemed to be a Union with Hungary, because both the countries speak the same language and they share a common political culture. Together, as earlier in history, they could have represented a considerable power, in a favourable political situation, even superiority against Vienna. The lack of a complete Union later resulted in tragedies for the Habsburg. The German Union without the Habsburg, later the dissolution of the Monarchy in 1918 was the price.

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28 GLADDEN, E. N.: *A History of Public Administration*, Vol. II. London, 1972. 152–154, 158–165.

29 ANDERSSON, P.: *Az abszolutista állam* (The Absolutist State). Budapest, 1989. 326–338.

Considering all that said before, it was obvious that Vienna's interest was to retain the constitutional independence of Transylvania, consequently to merge with it. The foreign political situation also strengthened this intention. After 1690 the Ottoman Empire was not any more a real danger on the Balkan, and it was a real possibility to drive back the Turks. The feudal states depending on the Turks, in the outer Carpathians and the northern Balkan would have been happy to ally with the Habsburg, in turn for freedom from the Turks. At the end of the century it became obvious the Russian czar was interested in these territories. Moldva and Havasalföld were also aware of the wisdom that the way to Austria leads through Transylvania. Therefore, Austria, had to reevaluate the war-political role of Transylvania and strengthen the tendencies of independence and melting. Among other things, that was the reason why Austria would now and then intervene in the ethnic questions of the region. If necessary, even by forcing the Rumanian and the Ruthenian to convert to the Uniate faith. Another reason for such intervention was the Habsburg endeavour to balance the political opposition among the traditionally powerful Transylvanian aristocracy, the Hungarian comitats and the Szeklers provinces.

III. The Way to the Union

1. In the XIXth century, there was a long way to the Union enacted by two free Diets—in Pozsony (Act VII of 1848); in Kolozsvár (Act I of 1948)—in the spring of 1948. Not only Vienna, but many of the ethnic groups of Transylvania obstructed this process to the Union. On the other hand, beside the temporal weakness of the Empire, changes in mentality and the related social changes also contributed to the declaration of the Union. A great achievement of 1948 and its political strife was that the Union forced from Vienna remained the condition of the Compromise of.

Concerning the obstruction it is worth mentioning the aristocracy of Transylvania initially had doubts about the Union, fearing its ancient privileges would be curbed. The historiography of the last century was uniform in the opinion the nobility of Transylvania was much more passive—either because of their lands or for other reasons—than its Hungarian counterpart in the first half of the XIXth century. Therefore, the agents of social changes were the enlightened and liberal aristocracy.[30] The Saxonian were, as usual, against the Union for fear

30 HORVÁTH: *Huszonöt év... op. cit.* Vol. I. 350, 427–431; and *Erdély története... op. cit.* Vol. III. 1269–

that they would lose their privileges, meanwhile the Rumanian had an ambivalent attitude. They, especially the intelligentsia agreed with the reforms, but they stipulated the guarantee of their national identity, i.e. they wanted to secure to be admitted as the fourth nation of Transylvania. Some of them even then considered the idea of unifying the Rumanian territories, though with some foreign political considerations in their mind. (N.B. the idea of unifying the territories of the voivodes with the Empire.)[31]

The real force behind the unification was the Hungarian liberal nobility representing those progressive European thoughts which enabled many nations to create their national states after many crises. The question of unity had been a big issue in the neighbouring German Empire since Napoleon, not less so in the Italian provinces which was quite close to Hungary. It is obvious one of the main aims of national revival was to unite people with the same language and cultural background into national states. The idea of the national state emerging in parallel with liberalism had a definite role in the political life of the Reform era.

2. As seen from the present, one of the manifestations of the above treated trends was that territorial revision in Hungary was an issue at the Diets of the Reform era. Here we would like to refer to the civilisation of the military border zones and the question of the Partium. Closely related to these issues is the introduction of Hungarian as an official language, which was opposed in Vienna in spite of the failures of making German the single official language of the Empire. The members of the contemporary Diets were heavily engaged in these topics, as well as with the Union.

2.1. As it has been mentioned earlier, after the Diet of 1790 the question of Union seemed to become dormant for the postponing tactics of the monarch. Still, the unsettled question of the Partium kept it alive. It is necessary to bear in mind that Partium originally meant the comitats of Tiszántúl (territory east of the river Tisza) which became part of the three nations of Transylvania after the Diet of Torda in 1544. Later on, the number of the comitats belonging to Transylvania had changed, but some of them were Transylvanian at the time of the Diploma Leopoldinum. Then, despite of Miklós Bethlen's strifes, a large proportion of these comitats (e.g. Máramaros, Bihar, Békés) were returned to Hungary, while the Kővár area: the Comitats of Közép-Szolnok, Kraszna, Arad and part of Zaránd Comitat remained in Transylvania. (N.B. Miklós Bethlen wrote the

31 *Erdély története... op. cit.* Vol. III. 1306–1309 and following pages.

Transylvanian wanted to keep all of the Partium because of the taxes which were comparatively much higher than during the Turkish rule.)

At the Diet of 1790, in connection with the Union it was declared the territories of Partium, parts of Transylvania in terms of public administration, were constitutionally Hungarian territory. The feudal classes came up with this fact at the Diet of 1832–36; moreover, they debated the issue separately, at the beginning of the session. They claimed Partium be reannexed to Hungary as soon as possible. Contemporaries suggested Miklós Wesselényi had a significant role in forming this view. He thought settling the question of the Partium was the key to the Union with Hungary. The solution was largely hindered by the selfish behaviour of the Transylvanian who, despite an obvious legal situation, obstructed the reannexation in an alliance with the Habsburg. At the beginning of her reign, at the Diet of Pozsony Maria Theresa promised to reannex the Partium, but only if the Diet of Transylvania would not object. In 1751, the Diet of Transylvania, without consulting the comitats concerned, argued—referring to an order by Charles III—that the Partium had always been a part of Transylvania. The representatives of the Partium resented this offensive method at the Diets of Pozsony and Kolozsvár in 1790–92. Then, they were promised to return the Partium.

2.2. This promise was not fulfilled and the issue was again on the agenda of the Diets of 1825–27, and 1830. Then again, Vienna, allying the Transylvanian, resorted to the tactics of postponement (N.B. from 1811, for more than two decades no Diet was summoned in Transylvania) until the Diet of 1832 did not intervene to stop that practice. The representations edited by the poet Kölcsey, and for which the diplomatic motivation was written by Wesselényi, had two important demands. Firstly, it demanded the immediate reannexation of the Partium, regardless of the Transylvanian Diet. Secondly, it required the immediate summoning of the Transylvanian Diet to debate the question of the Union with the Diet of Pozsony in session. The opposition members of the Diet sent letters concerning this question to the comitats of the Partium and the Transylvanian to emphasise the importance of the issue. In these letters, they suggested the active involvement of the addressees in finding a solution.[32]

As this action was successful (the details and the difficulties of which we cannot discuss here), the monarch gave his assent to one of the bills, i.e. he sanctioned the reannexation of the Partium (Act X of 1832). Presumably because of its fears about the Union, Vienna compromised accepting the bill about the

32 HORVÁTH: *Huszonöt év... op. cit.* Vol. I. 346–353., *Erdély története... op. cit.* Vol. III. 1296.

Partium as the smaller trouble. In regard to the Union, they applied the good old method, when after a long time of petitioning the monarch summoned the Diet in Transylvania in the spring of 1834. Wesselényi and the more enlightened Transylvanian aristocrats, together with some of the intelligentsia started to submit and debate reform amendments even earlier.

2.3. In historical reports they were referred to as the wandering patriots,[33] because they made a tour in the whole of Transylvania thus managing to form a competent opposition for the Diet. Beside Wesselényi, the names of Domokos Teleki and Károly Szász, a professor of law should also be mentioned. The spiritual leader of the movement was, of course Wesselényi, whose charisma could best be illustrated by the case when his Szeklers followers bought him an estate in Makkfalva to secure him a seat in their assemblies.[34] But, Vienna did not hesitate too much to dissolve the determined Transylvanian Diet which was organised this way, and which dared appoint their own candidate for speaker.[35]

2.4. Regardless of Vienna's temporal successes in its government strategies, this was not entirely forgotten. They sued Wesselényi, Kossuth and the youth of the Diet in vain. The Hungarians introduced the question of the Partium, traditionally following the path of legitimacy, a reason for which being the postponement tactics of the government. The Transylvanian courts of law appointed in Vienna declared law of Unification of the Partium with Hungary unlawful. The high bailiffs of the concerned comitats prevented the counties summoning assemblies for electing representatives to the Diet. The Diet of Pozsony responded by taking a constitutional action against the absent comitats of the Partium. To a great surprise, the law-court approved the claim of the Diet of Pozsony and fined the concerned comitats. The opposition of the Diet, quoting the Law of Wladislas II, made a motion asking to call the high bailiffs to account. In connection with the same issue, Pozsony sent other representations to the monarch asking him to assent to the Bill of Union agreed on by the formerly dissolved Transylvanian Diet. The answer was postponement.[36]

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33 HORVÁTH: *Huszonöt év... op. cit.* Vol. I. 425.

34 TRÓCSÁNYI, Zs.: *Wesselényi Miklós.* Budapest, 1965. 229 provides a lot of details in connection with members of the Transylvanian opposition who made tactful actions similar to that when Wesselényi was made a representative of Udvarhelyszék.

35 HORVÁTH: *Huszonöt év... op. cit.* Vol. I. 430–, TRÓCSÁNYI: *Wesselényi Miklós, op. cit.* 233–, *Erdély története... op. cit.* Vol. III. 1276–.

36 HORVÁTH: *Huszonöt év... op. cit.* Vol. II. 244–245. MISKOLCZY, A.: Társadalom, nemzetiség és ellenzékiség kérdései az erdélyi magyar reformmozgalomban (The Issues of Society, Nationality, and Opposition in the Transylvanian Reforms Movement). *Századok,* 1983. No. 5. 1051–1096.

Similarly, postponement was the strategy when the court decision against the absent comitats was to be implemented. Then, the question of the Partium seemed to be the clear evidence of the government strategies of Vienna at the Diet of 1847. Kossuth, in his two-hour speech calmly analysed the grievances Vienna had caused to Hungarian parliamentarism and legislation.[37] Although his speech was met with the greatest approval, the government did not do anything, so these problems were to be solved by the Diet of 1848.[38]

3. The course of legislation of March 1848 is quite familiar and elaborated in the historiography of Hungary. These works unequivocally point out, beside underlining the constitutional significance of the laws of 1848, that this legislation was hastened because of the revolutionary situation, therefore it has some deficiencies. It relates to this question and therefore significant that although the Hungarian Diet in Pozsony had enacted the bill of the Union with Transylvania, they were waiting for the Transylvanian Diet to strengthen it. This decision of the Diet was soon made without studying the important details of the unification, due to the shortness of time. Both Diets decided that after declaring the Union, they would work out the details of unification later.

The Transylvanian Diet pronounced (Act 1848/1 paragraph 3) that until a final agreement "the structure and personnel of public administration and jurisdiction will not change". This passage caused many problems. As it is indicated in the literature, the Court of Vienna, after sanctioning the forced laws, soon faced the predicted danger that the Union of Transylvania with Hungary meant for them. Their reaction was a double-front attack. On the one hand, the Court wished to treat the Transylvanian and the Hungarian incomes separately. On the other hand, they wished to restitute the formerly abolished Transylvanian Royal Chancellery, which could have facilitated their direct intervention in the domestic affairs of the province.[39] For the Court, a sufficient guarantee could have been the planned maintenance and direction of the Transylvanian military border zone from Vienna.

The "responsible independent Hungarian Ministry" also realised this problem and started co-operation with the so-called Union Committee, removed from the Transylvanian Diet to the Hungarian central government, to facilitate the democratic procession of the Union. As a result of this co-operation, the Hungarian government was ready to appoint Transylvanian officials and set up

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37 HORVÁTH: *Huszonöt év... op. cit.* Vol. II. 546–548.

38 *Ibid.* 615.

39 F. KISS E.: *Az 1948–49-es magyar minisztériumok* (The Hungarian Ministries in 1848–49). Budapest, 1987. 164–182, particularly 166–168, about the military border zones. Footnote 7. on 166.

a separate Transylvanian section, particularly in the Ministry of the Interior and the Ministry of Justice.[40]

The imminent War of Independence prevented this question being constitutionally elaborated, and the governments coming after the Compromise of 1867 had to face and solve them.

40 *Ibid.* 170–172.

ACTA JURIDICA HUNGARICA
2000 41 Nos 1-2, pp. 47-78

1216-2574 / 2000 / USD 5.00

Renata UITZ

Does the Past Restrain Judicial Review?

References to History and Traditions in Constitutional Reasoning

> "You must understand that after what Germany lived through under Nazism, it would have been impossible to restore capital punishment."
>
> *Jürgen Habermas*[1]

Introduction

Arguments invoking the past are among the most often invoked arguments in the reasoning of constitutional review *fora*.[2] Although arguments relied on in constitutional reasoning are not self-legitimating,[3] the legitimacy of references to history is hardly ever questioned. The reasons for such a high stature or

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1 In response to a question concerning his views on capital punishment, at Harvard University, Cambridge, Mass. (1986). BERMAN, H. J.: Toward an Integrative Jurisprudence: Politics, Morality, History, *California Law Review*, 1988. Vol. 76, 791.

2 For an argument that history is a common denominator from which constitutional argument may proceed see SUNSTEIN, C.: The Idea of the Useable Past, *Columbia Law Review*, 1995. Vol. 95, 604. For present purposes the scope of the term "constitutional reasoning" is restricted to the arguments made by constitutional review *fora* (i.e. high courts exercising constitutional review and constitutional tribunals). Scholarly arguments advanced in the academic discourse are not covered by the forthcoming analysis, although some of the findings might be applicable even in the latter context.

3 See SUNSTEIN, C.: Five Theses on Originalism, *Harvard Journal of Law and Public Policy*, 1996. Vol. 19, 311 submitting that no approach to interpretation is self-justifying, as all approaches depend on personal judgment.

esteem for arguments invoking the past are manifold. Some of these reasons seem to be rooted in the belief that the unavoidable continuity of past, present and future makes past experience relevant for present and future.[4] Others argue that constitution-making—as other human acts in politics—starts from a historically determined context;[5] or, from a lawyer's point of view one may argue in a somewhat similar vein that law is a "sediment of history".[6] Again others, who are more focused on the nature of legal interpretation as textual interpretation, would argue that constitutions as old written documents cannot be interpreted without keeping an eye on the context in which they were authored.[7] Nonetheless, as Justice Holmes duly submitted, "(h)istoric continuity with the past is not a duty, it is only a necessity".[8]

This essay intends to explore the basic features of historical narrative as applied by constitutional review *fora* and as perceived by commentators, lawyers and theorists. The first part of the essay analyzes whether references to history and

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4 RÜSEN, J.: *Studies in Metahistory,* Pretoria, Human Sciences Research Council, 1993. 5. Also, historian Donald Kagan: "The institutions and ideas that provide for freedom and improvement in material conditions cannot flourish without and understanding of how they came about." KAGAN, D.: Why Western History Matters, *Wall Street Journal*, Dec. 28, 1994, A.12. In addition see Gordon's submission: "Every important political or legal argument is an argument either changing, preserving or recovering something in the past, which in turn relies on a narrative account of what has been changed and why." GORDON, R.W.: Foreword, The Arrival of Historicism, *Stanford Law Review,* 1997. Vol. 49, 1026.

5 POCOCK, Introduction (in: BURKE, E.: *Reflections on the Revolution in France* (1790) POCOCK, J. G. A. (ed.) Indianapolis, Hackett, 1987. vii). Bobbitt noted that the legitimacy of historical argument is often tied with the perception of the constitution as a contract. BOBBITT, Ph.: *Constitutional Fate, Theory of the Constitution,* Oxford, Oxford University Press, 1984. 26.

6 BICKEL, A.: *Least Dangerous Branch, The Supreme Court at the Bar of Politics*, New Haven, Yale University Press, 1986. 235. In this approach law is the product of the historically developing ethos. On the historical school of jurisprudence see BERMAN, *op. cit.*, 780, 788–791. The leading European figure of the school is F.-K. von Savigny. See also KRYGIER, M.: Law as Tradition, *Law and Philosophy*, 1984. Vol. 5, 237. See DWORKIN, R.: *Law's Empire*, Cambridge, Mass., Harvard University Press, 1986. 227 *et seq.* submitting that the historicity of the legal system is not vertical but horizontal, a feature which contributes to the integrity of the law.

7 "[C]onstitutional texts are ... the starting point for the definition of constitutional norms. Constitutional norms to be applied by present-day judges cannot simply be found in texts formally adopted two Centuries ago. As applied today, 'old Constitutions' are those texts as presently construed." SMITH, Introduction (in: *Constitutional Justice under Old Constitutions*, SMITH, E., Deventer, Kluwer, 1995. xvii).

8 The *bon mot* is attributed to Oliver Wendell Holmes.

tradition form objective or neutral grounds for interpretation, and, in somewhat broader terms, whether arguments in history are capable of serving as a restraint on constitutional interpretation. The basic premise of the essay is that historical narratives invoked in constitutional reasoning are in essence similar to any other historical rhetoric. Thus, historical references made by constitutional tribunals are examined in the light of findings of historiography. The focus of the second part is on the relationship of common law reasoning and arguments in history and tradition. The essay makes an attempt to conceptualize repetition—the core notion underpinning historical narratives—in the light of basic tenets of common law reasoning. In addition to fundamental concepts of common law, respective works of Edmund Burke are also consulted.

The essay concludes that historical narratives are teleological and normative, and no constitutional rhetoric relying on the past can escape these basic attributes of historical narratives; thus, one may find that historical narratives are interpretive *per se*. It is also argued that common law legal reasoning seems to display features similar to historical narratives. Also, the common law rhetoric is able to accommodate references to past events, which support attempts at departure from established practices. The direction of such potential departures depends on the interpreter, since past events do not and cannot provide clear guidance. Thereupon it is suggested that even the most profound adherence to history and traditions is unlikely to serve as a substantive restraint on constitutional interpretation.

I Preliminary Observations

I.1 Illustrative references, legislative history and framers' intent

Before discussing in detail arguments invoking the past, it is important to distinguish the references that are targeted by the present analysis. The present essay will not cover illustrative references to history, arguments in legislative and drafting history, or arguments based on the intentions of the drafters of the constitution. Although such arguments refer to past events, analytically they belong to doctrinal arguments relied on in legal reasoning.

References to history may provide excellent illustrations and serve as examples or counter-examples in constitutional argument,[9] demonstrating

9 In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) Justice Stevens submitted that "(a)dvertising has been a part of our culture throughout our history. Even in colonial days, the

instances of good moral.[10] Such references are often ahistoric as their primary purpose is to demonstrate the victory of the past ideal over time and individual events.[11] One shall also note the common features of historical exempla and analogical reasoning, means often applied in doctrinal argument.[12]

For present purposes arguments invoking the past are considered to include references to past events other than the legislative history of a statute in a narrow sense, and the intent of the framers of a constitution.[13] References to legislative history and to the intent of the framers are the most common examples of doctrinal arguments in legal reasoning.[14] Although these references are not going to be

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public relied on 'commercial speech' for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados." (internal references omitted).

10 KRAMER, L.: Fidelity to History, *Fordham Law Review*, 1997. Vol. 65, 1635.

11 These attempts often display a longing for origins, for myths of ancient virtues and even nostalgia for an ancient way of life. See LEGOFF, J.: *History and Memory*, New York, Columbia University Press, 1992. 141 showing how arguments in history and tradition were used to construe *mos maiorum* in the ancient Rome. On Coke's ahistoric, semi-mythical vision of custom see McCONNELL, M. W.: Tradition and Constitutionalism before the Constitution, *University of Illinois Law Review*, 1998. 175–183. It was submitted recently that all those references which argue that a term or norm has a historically defined meaning are in fact ahistoric, as they fix the meaning of the term or norm and they do not allow alterations by time. GORDON, R. V.: The Struggle over the Past, *Cleveland State Law Review*, 1996. Vol. 44, 125. In Gordon's terminology it is a static argument.

12 Although a review of such illustrative references might reveal interesting aspects of the jurisprudence of a constitutional tribunal and the legal system in which the tribunal operates, such an analysis does not belong to the stream of the present argument.

13 Contemporary US discourse on originalism is centered around the intent of the Framers, drafting and ratifying history. Framers' intent and drafting history are a lot less significant in the jurisprudence of courts where the drafting and ratification of the constitution are not perceived or construed as supreme founding gestures. The jurisprudence of the Constitutional Court of Germany might be an example. This is certainly not to mean that the German Constitutional Court's jurisprudence lacks references to the past. See e.g. the *Mephisto case* (30 BVerfGE 173 (1971)) or the *Holocaust denial case* (90 BVerfGE 241 (1994)) where the reasoning of the German Constitutional Court rested on reasons reflecting the Court's perception of history (and the perception of the Holocaust, in particular). For edited English translations of the decisions with commentary see KOMMERS, D. P.: *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed.) Durham-London, Duke University Press, 1997.

14 References to shared values of the community (as a distinct form arguments in tradition) are

examined here in detail, they have a few aspects that are worth noting. Legislative history in a narrow sense is a record of legislative events or the lack thereof preceding the entry into force of the legal norm interpreted.[15] Sometimes legislative history may include references to the legislative records of the act concerned, although most constitutional review *fora* refuse to recount the votes that a bill received in the house. Even if such a record of previous legislation is supplied with underlying policy or other considerations, typically these arguments remain within the domain of doctrinal arguments.[16]

The case of the intent of the framers of the constitution is more complex, especially because it is a major source relied on by originalists and other interpreters with intentionalist inclinations.[17] As a result arguments presenting the intent of the framers may be difficult to distinguish from arguments in history.[18] It is important to see, however, that while a reference to the framers'

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also excluded for reasons to be explained below.

15 As an example of legislative action which does not qualify as legislative history in the above sense see *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). In the case the US Supreme Court had to decide whether continuous congressional apportionment allotted for a dam constituted a waiver of the bans enacted in a prior statute applicable to the dam (*Endangered Species Act*, 1973).

16 In rare cases review *fora* might use legislative history to show that Congress refused to enact a certain norm, or that a certain interpretation of a provision was not to be supported by the words of a particular provision. For instance in the US in the Pentagon Papers case the government argued that Congress intended to authorize the president to exercise the power contested in the case. In this case, Justice Th. Marshall showed that Congress twice refused to enact the legislation which would authorize the president. *New York Times Co. v. US*, 403 U.S. 713, 746 (1971).

17 In contemporary US discourse there is a debate whether and to what extent it is legitimate to refer to pre-Founding history and tradition in constitutional argument. See e.g. BROWN, R.: Tradition and Insight, *Yale Law Journal*, 1993. Vol. 103, 191 contesting the application of pre-Founding historical evidence, since the Founding Fathers intended to break from most political traditions. In Canada the issue whether and to what extent the intentions of the Fathers of the Confederation shall be taken into account in judicial decisions has not been resolved and is rarely ever discussed. Nonetheless, Canadian courts tend to consider Confederation history and in Charter cases history has a central role to play. VAUGHAN, F.: The Use of History in Canadian Constitutional Adjudication, *Dalhousie Law Journal*, 1989. Vol. 12, 66 *et seq.* The history of the Charter (including earlier drafts of the text) is widely relied on in judicial opinions. Note that in Canada it was maintained for a long time that the founders were practical men without theories and their reasons were limited to the problems of the moment but not beyond. This view has been challenged only recently.

18 See Friedman commenting that "Justice Scalia, for example, has come under fair criticism for insisting that in order to obtain constitutional protection, a constitutional right must have been

intent offers guidance with invoking authorities from that particular segment of the past, references to history and tradition intend to assert the authority of specific past trends or events.[19]

I.2 The past: facts and arguments

When considering references to the past in constitutional reasoning one may argue that there is a difference between references to the past as the facts of the case and as argument supporting a position in interpretation. Such a position may be based on a submission that depending on the character of the submission (i.e. facts of a case or historical arguments) different standards of persuasion may apply.[20] Historical data are introduced by the litigants in the form of factual submissions and are subject to the rules of evidence. A high court is restricted to the array of facts as established by the trial court.[21] When introduced by the

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recognized by the founders at the narrowest level of specificity." FRIEDMAN, B.: The Turn to History, *New York University Law Review*, 1996. Vol. 72, 963.

19 Cf. KRAMER, *op. cit.*, 1640–1641 arguing that instead of applying the ideas of the framers as they were presented cannot substitute looking at history as the context of the founding. On the difficulties to accommodate a Framers' intent argument as a *per se* historical argument see BARBER, S.: *On What the Constitution Means*, Baltimore–London, Johns Hopkins University Press, 1984. 47–49. Barber argues that the Framers' cannot be discredited upon historical data as our comprehension of historical data would be based on our current standards of morals, good and bad. For an interesting US reference to tradition prevailing over the Framers' intent see Justice Scalia's dissent in *Lee v. Weisman*, 505 US 577 (1992) (the prohibition of prayers at graduation in public schools). Justice Scalia argued that the tradition of the graduation prayer takes precedence over the Framers' intent.

20 For the argument see OGILVIE, M. H.: Evidence, Judicial Notice, Historical Documents and Historical Facts, Indian Treaty Rights, Note, *Canadian Bar Review*, 1986. Vol. 64, 183. Instances where historical evidence is invoked to establish the facts of the case are very rare. Most of those cases involve war crimes from World War II. See e.g. *R. v. Finta* (1994) 1 S.C.R. 701, a case involving a mass murder committed by a former member of the Hungarian Royal Gendarme in 1944. Note however that such cases are usually not constitutional cases, or the constitutional question is not dependent upon the historical inquiry. The distinction between the facts of the case and argumentative references to the past is not relevant in abstract review cases and in preliminary review.

21 In general a high court may reconsider the findings of fact of the trial court and may also request briefing. The most famous example of requesting supplementary briefing on history in the United States is *Brown v. Board of Education of Topeka I*, 347 U.S. 483 (1954). Nonetheless, Chief Justice Warren writing for a unanimous Supreme Court did not develop a line of historical argument in the reasoning of the judgment. In Canada the Supreme Court formulates a constitutional question when it grants leave to appeal. It is the formal statement of the

parties, arguments in the past are often presented in the form of expert evidence.[22] References to the past used for constitutional or statutory interpretation on the other hand may be introduced by not only the parties but also the court.

In the US the courts' extensive use of historical evidence is partly due to the originalist inclinations of the present Supreme Court. In Canada, however, extrinsic evidence such as legislative history was not admissible in courts until recently.[23] Nonetheless, it was suggested that it is appropriate for judges to take judicial notice of historical facts.[24] The entry into force of the Charter of Rights increased judicial creativity in constitutional reasoning and also in the admissibility of references to the past. Thus one may find that, independent of whether rules of evidence apply to submissions made by the parties, contemporary courts are relatively free to introduce new historic evidence at their discretion.

As for factual submissions, one may find that courts are free to determine the relevant facts of a case. This means that justices are free to select the submissions of the parties along the lines and for the purposes of their legal analysis. Also, as it was shown, courts interpret historical evidence. Thus the status of factual submissions made by the parties under strict rules of evidence and historical references introduced by the court becomes indistinguishable in the court's argument. More precisely the difference is distinguishable to the extent the court

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constitutional issue to be addressed by the Court. One of the purposes of phrasing the question is to invite the attorney generals of Canada and the provinces and the ministers of justice aware of the constitutional question to intervene pursuant to Rule 32(4). In its judgment the Court may nevertheless approach the constitutional issue in terms broader than signaled by the constitutional question, as long as such a change does not deprive the interveners to engage in substantive argument. *Corbiére v. Canada* (1999) 2 S.C.R. 203 at para 49 per L'Heureux-Dubé, J.

22 In the United States the originalist trend in the Supreme Court resulted in a boom of expert testimony on history. Some of the opinions lead to lively and harsh arguments among professionals long after the trial. See FARBER, D.: Adjudication of Things Past, Reflections on History as Evidence, *Hastings Law Journal,* 1998. Vol. 49, 1009.

23 See HOGG, P.: *Constitutional Law of Canada* (2nd ed) Toronto, Carswell, 1985. 34. Hogg notes that legislative history is so recent that handling it does not require special skills in history. HOGG, *op. cit.*, 344.

24 "The Court may take judicial notice of the facts of history whether past or contemporaneous, and the Court is entitled to rely on its own historical knowledge and researches." Justice Hall, dissenting in *Calder v. Attorney-General of British Columbia* (1973) S.C.R. 313 at 346 (references omitted). Notwithstanding the views of J. Hall, the Court in Calder did not engage in independent research. See VAUGHAN, *op. cit.*, 81. As Ogilvie suggests the legal basis for it might be a generous interpretation of judicial notice. OGILVIE, *op. cit.*, 205. A less formalistic approach would find the normative basis of the development in theories of constitutional interpretation.

presents references to history in a manner which makes the difference apparent.[25]

The distinction between history as facts of the case and history as an argument is relevant only to a rather limited, negative extent. The distinction might play a role in cases where a test to be applied by constitutional review *fora* or by ordinary courts calls for the examination of historical data. If in a case a high court cannot decide upon the facts as established in trial, the high court remands the case for retrial.[26] Otherwise the highest judicial forum runs the risk of establishing its judgment on an incomplete or erroneous factual background.[27] However, in such cases the courts tend to refuse to analyze historical evidence.[28]

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25 For a recent example where historical facts and arguments in history were treated distinctly in a constitutional case see *Corbiére v. Canada* (1999) 2 S.C.R. 203. Corbiére is a decision especially interesting as the Canadian Supreme Court's aboriginal rights jurisprudence and equality jurisprudence intersect in the case. S.35 of the *Canadian Constitution* invites historical narratives when it provides that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. The Supreme Court consults history and traditions in order to establish which aboriginal rights date back to days before European contact. On the other hand, in cases involving equality issues (s.15, *Charter*) the effects of past discrimination became one of the major targets to be eliminated. See the opinion of Justice Iacobucci in *Law v. Canada (Minister of Employment and Immigration)* (1999) 1 SCR 497. In *Corbiére* the Supreme Court had to determine whether it was constitutional that the *Indian Act* deprived off-reserve band members from band council elections [s.77(1)]. The justices examined historical evidence on the historical background of the claim in the Batchewana Band. See *Corbiére*, paras 27–30 per L'Heureux-Dubé, J. (on changes of the territory of the reserve and status of band members). The justices agreed that the case should be decided in general and not restricted to the Batchewana Band. Id. at para 93. The analysis under s.15(1) of the Charter determining the discriminative impact of the challenged provision [third trier of the equality analysis] relied on the all-Canadian history of treatment of aboriginal peoples. See *Corbiére*, para 83, 86–89.

26 See e.g. *R. v. Sparrow* (1990) 1 S.C.R. 1075.

27 For a Canadian example where commentators argue inappropriate use of historical facts as opposed to arguments see BARSH, R. L.—HENDERSON, J. Y.: The Supreme Court's Van der Peet Trilogy, Naive Imperialism and Ropes of Sand, *McGill Law Journal*, 1997. Vol. 42, 1003, note 36 criticizing the Supreme Court for its reluctance to reconsider the trial court's findings of facts, a move which led to inconsistencies in the Supreme Court's application of its test in two cases announced the same day.

28 Justices themselves do not always agree on the proper judicial attitude in supreme courts towards fact-related analysis performed by a trial court. To a large extent the attitude of a supreme court towards the findings of the trial court depends on the self-perception of the supreme court. For an excellent illustration see *R. v. van der Peet* [1996] 2 S.C.R. 507 para

Thus, one may see that references to the past as facts and as arguments are introduced under different standards of admissibility. Nonetheless, courts usually do not distinguish these submissions in their argument; historical evidence once admitted or introduced under different standards of scrutiny and other references to history are argued in similar narrative structures. Therefore, judicial consideration of historical data among the facts of the case as opposed to references to the past argument in support of a legal position shall be treated identically for the purposes of the present analysis.

II Teleology, Normativeness and Continuity

II.1 Historical data: the myth of objectivity

Constitutional review *fora* often engage in analyzing the historical background of the issue at hand, both the past of its constitutional side and also the events behind the contested norms. References to historical facts and data are attractive for a number of reasons. They suggest clear-cut, black-and-white answers that can be established on the basis of objective data.[29] If viewed so, references to history are descriptive and historical evidence is a non-interpretive tool of reasoning (facts speak for themselves). Thus, historical evidence suggests that the constitutionality of the challenged norm is going to be determined on an objective basis.[30]

207–208, per L'Heureux-Dubé, J., dissenting. (Contrary to the generally accepted deferential stance of the Canadian Supreme Court towards the assessment of evidence by the trial court, Justice L'Heureux-Dubé argues that the Supreme Court as an appellate court is free to reconsider the evidence and substitute its own findings of fact.)

29 GORDON (1997), *op. cit.*, 1025 (lawyers want a single, authoritative meaning from a past act or practice). Crosby submits that in recent constitutional theory the main dividing line is between those who place interpretation on an objective foundation (originalism, based on historical facts) and those who find that undesirable. CROSBY, I.: Worlds in Stone: Gadamer, Heidegger, and Originalism, *Texas Law Review*, 1998. Vol. 76, 849. For an argument that objectivity is a component of the rule of law (along with stability and neutrality) see SCHLAG, P.: Authorizing Interpretation, *Connecticut Law Review*, 1998. Vol. 30, note 11 at 1069. Dictionary definitions also offer an air of objectivity. For a profound analysis see APRILL, E. P.: The Law of the Word, Dictionary Shopping in the Supreme Court, *Arizona State Law Journal*, 1998. Vol. 60, 275. Aprill argues that lexiographic principles upon which dictionaries are created undermine the promise of objectivity. *Id.* at 314.

30 In this sense the psychology of arguments in history is similar to the 'plain meaning' argument. Owen Fiss submits that the claim that the text of the constitution has numerous

Also, references to historical evidence imply that the interpreter is neutral (impartial) as the standard along which the issue was decided is an objective one.[31] Historical arguments hint that every observer would have arrived at the same conclusion, thus they suggest the neutrality (impartiality) of the decision-maker and the decision.[32] In addition, arguments in history suggest that the decision lies on well-set, established grounds. In other words these decisions seem to preserve the *status quo*, they create an impression of stability and continuity.[33] The record, however, does not seem to support the above findings.

Constitutional review *fora* are often criticized for writing bad history. Numerous scholars argue that the justices misunderstood or misinterpreted historical data. The debate continues on the bench, justices often condemn each other for applying mistaken conclusions drawn on history. Sometimes one may have the impression that these disputes on proper or tainted use of historical sources and data go well beyond the legal issues that gave rise to the dispute.[34]

Most of these disputes about history seem to be impossible and even unnecessary to resolve. The pragmatic consideration behind this deferential point of view is easy to see. In many cases arguments invoking the past are not the only arguments, they are supplementary to legal reasons.[35] Cass Sunstein suggested another ground for reconsideration. He submitted that constitutional justices have

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meanings is a nihilist one (nihilist attempts turn the law's struggle for objectivity against it). FISS, O.: Objectivity and Interpretation, *Stanford Law Review*, 1982. Vol. 34, 742.

31 "Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage-point of the person offering the interpretation. Objectivity implies that the interpretation can be judged by something other than one's own notions of correctness. It imparts a notion of impersonality. The idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained." FISS, *op. cit.*, 744.

32 Neutrality in the judicial context may refer to the outcome of a judgment but also to a technique of decisions. Neutrality considerations are often raised in the context of racial and gender discrimination, free speech and freedom of religion. Classic texts on the requirement of neutrality in judicial decision-making are WECHSLER, H.: Toward Neutral Principles of Constitutional Law, *Harvard Law Review*, 1959. Vol. 73, 1 and BORK, R.: Neutral Principles and Some First Amendment Problems, *Indiana Law Journal*, 1971. Vol. 47, 1.

33 Note that an argument in history creates discontinuity when the historical example refers to the "disliked past". GORDON (1997), *op. cit.*, 1028.

34 In the US see e.g. BROWN, *op. cit.*, 210-211. Such concerns are voiced in a climate where justices tend to strongly disagree about the historical background of a given case. In Canada see VAUGHAN, *op. cit.*, 61.

35 TENBROEK, J.: Admissibility and Use by the United States Supreme Court of Extrinsic Aids of Constitutional Construction [Part 1], *California Law Review*, 1938. Vol. 26, 295–296.

an instrumental relationship to history: they refer to arguments in history with a specific outcome, or rather, with a variation of possible future outcomes in mind.[36] Some may argue that this teleological (result oriented) approach is exactly what makes historical arguments so untrustworthy when raised by constitutional review *fora*.[37]

Studies in historiography, however, seem to support the case of the relativist. It is argued that lawyers are not the only interpreters of historical data with a predetermined mindset.[38] Historical components are chosen along predetermined patterns of interpretation.[39] Historical explanations are based on metahistorical presuppositions, such as moral or value arguments, and one

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36 SUNSTEIN (1995), *op. cit.*, 602–605 ["lawyers tend to look at the past to accomplish present purposes, and historians out of endless fascination for strange contexts". Id. at 602]. See also KRYGIER, *op. cit.*, 249–250. Also: "It is the past put in the service of winning a case at bar." Words of John Reid on quote in GORDON (1997), *op. cit.*, 1026. See also Rakove submitting that the search for history is a search for prefigurations, anticipations and precedents. RAKOVE, J.: The Origins of Judicial Review, a Plea for New Contexts, *Stanford Law Review*, 1997. Vol. 49, 1038. [In the essay Rakove argues that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) is not so much about judicial review than about federalism.]

37 Consider for instance that being "(e)ager to discover a viable libertarian heritage, narrative histories of the Bill of Rights have ignored the presence of alternative ideological traditions in American life". CORNELL, S.: Moving Beyond the Canon of Traditional Constitutional History, Anti-Federalists, The Bill of Rights, and the Promise of Post-Modern Historiography, *Law and History Review*, 1994. Vol. 12, 7 Cornell suggests that instead of seeking a single intellectual tradition it makes more sense to explore the plurality of competing discourses.

38 "American legal argument from the Founding onward consistently relied upon a core narrative of liberal progress... To reconcile this dynamic narrative with the need to assert continuity with fundamental principles, the story was often told in a teleological mode, as the gradual fulfillment of perfection of principles already immanent at the Founding." GORDON (1996), *op. cit.*, 130.

39 RÜSEN, J.: Experience, Objectivity, Orientation, Three Dimensions of Historical Learning (in: RÜSEN, *Metahistory...*, 89) showing that patterns of interpretation structure the different types of knowledge and experience. Cornell submits that the current US canon of constitutional history includes the Federalists, the state ratification debates and the legislative debates during the First Congress, sporadic references to popular contemporary scholars believed to express Federalist ideas and to Anti-Federalist writing. It does not contain the Anti-Federalist writings and does not cover Anti-Federalist political action. Cornell argues that one shall always examine why certain sources were accepted to a canon without real scrutiny and what is the reason for excluding other potential authorities. CORNELL, *op. cit.*, 3. See also Bruce Ackerman arguing that contemporary US constitutional history is mistaken because the interpreters rely on European theories, instead of the works of American authors. See ACKERMAN, B.: Constitutional Politics/Constitutional Law, *Yale Law Journal*, 1989. Vol. 99, 453.

presupposition is not better than the other.[40] Thus, not only lawyers but also professional historians select (pick and choose) historical data and they gather these pieces of information along the point which they intend to make.[41] In addition, connecting and describing historical data are in themselves gestures of interpretation.[42] Therefore the view which suggests the objective character of arguments in history seems to be mistaken. Due to methodological reasons, historical argument is teleological. Also, it implies choices that are not always possible to distinguish from the personal preferences of the observer (subjective element).[43]

The other point concerning the objective character of arguments in history is even more bothersome. As of today there is no agreement on what qualifies as a specifically historical explanation of any set of historical phenomena.[44] As Bobbitt remarked: "We do not have an original commitment to a particular form

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40 WHITE, H.: *Metahistory, The Historical Imagination in Nineteenth-century Europe*, Baltimore, Johns Hopkins University Press, 1993. 13. This finding is not to be confused with the Conservative conception of time as a creator of value. See MANNHEIM, K.: *Ideology and Utopia. An Introduction to the Sociology of Knowledge*, London, Routledge, 1991. 211. White's theory of historical narratives corresponds with the Heideggerian concept of human understanding ["interpretation is never a presuppositionless apprehending of something presented to us...One likes to appeal to what 'stands there', ... [but] what 'stands there' in the first instance is nothing other than the obvious undiscussed assumption ... of the person who does the interpreting..." HEIDEGGER, M.: *Being and Time* (Sein und Zeit) (7th ed.), Oxford, Blackwell, 1962. 191–192.

41 See Bickel finding that values do not come from metaphysics but from compromises with good and an evil—in the experience of the past. BICKEL, A.: Constitutional Government and Revolution (in: *Edmund Burke, Appraisals and Applications*, Ritchie, D. E. (ed.), New Brunswick–London, Transaction Publishers, 1990. 144.

42 WHITE, H.: The Historical Text as Literary Artifact (in: White, H.: *Tropics of Discourse, Essays in Cultural Criticism*, Baltimore–London, Johns Hopkins University Press, 1992), 89.

43 See Sunstein arguing that normative and positive choices in judicial decision-making can not always be separated. SUNSTEIN, C.: Problems with Rules, *California Law Review*, 1995. Vol. 83, 1003.

44 WHITE (1993), *op. cit.*, 13. See an argument advanced by Chief Justice Burger. In explaining the relationship of citizens vis-à-vis their states he referred to the example of General Lee who refused the invitation of President Lincoln to become the commander of the US army. Instead, Lee went to Richmond and offered his services to Georgia shortly before the Civil War. According to Burger this was "not for the support of secession, not for the defence of slavery, not for the dissolution of the Union, but simply for the defence of his native state". BURGER, W. E.: The Origins of the United States Constitution, *Law Society Gazette*, 1985. Vol. 19, 215–216.

of historical argument. To what source are we to refer to an authoritative understanding?"[45]

Thus, the claim of objectivity submitted as one of the major virtues of arguments in history appears to be questionable. As Hayden White reveals, there is no such thing as objective history, instead there is a plurality of legitimate views but no exclusive objectivity.[46] In fact, the objectivity of history cannot mean more than a skill to prove facts or sequences of facts.[47] The writing of history, historical narrative, is a verbal fiction.[48] Writing history is about interpreting facts.[49]

The intellectual framework of such an interpretation of historical data is rather complex. On the one hand, some argue that the interpreter cannot distance herself from the historical continuity or tradition in which she is situated. Therefore the interpreter, being part of the flow of events, cannot have an external account of historical data. From the perspective of hermeneutics it means that history is part of the interpreter's mindset; therefore, historical prejudices influence the interpretation of historical data. For the interpreter it means that she has to discount her own prejudices when approaching the object of interpretation and, also, she has to take into account the potential prejudices of the author of the text that is interpreted.[50]

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45 BOBBITT, *op. cit.*, 10.

46 WHITE, H.: The Burden of History (in: WHITE, *Tropics...*, 47). Cf. "The object of every interpretive controversy, when it really is an interpretive controversy, is always and only a particular historical fact, and there is no general way to determine what any particular historical fact might be." Steven Knapp on quote in CAMPOS, P.: That Obscure Object of Desire, Hermeneutics and the Autonomous Legal Text, *Minnesota Law Review*, 1993. Vol. 77, 1092. Promoters of the 'new constitutional history' in the US reject the idea that it is possible to reconstruct the single meaning of the law upon historical evidence; instead they submit that there are as many readings as many interpreters who construe them. CORNELL, *op. cit.*, 20.

47 GOTTSCHALK, L.: *Understanding History, a Primer of Historical Method*, New York, Alfred A. Knopf, 1968. 9.

48 WHITE (1992), *op. cit.*, 82 *et seq.* submitting that historical narrative is as much invented as found, events are made into a story, it is for the audience to decode ("re-emplot") the events and determine their significance.

49 WHITE, H.: Interpretation in History (in: WHITE, *Tropics* ..., 51) holding that historical narrative is a mixture of adequately and inadequately explained events.

50 For a summary of approaches related to traditions in constitutional argument see also MOORE, M. S.: The Dead Hand of Constitutional Tradition, *Harvard Journal of Law and Public Policy*, 1995. Vol. 19, 265.

II.2 Traditions of the polity

In constitutional reasoning there are numerous references to past events which, on their face, are different from plain references to historical data. The authority of the past is often claimed with reference to "a set of practices ... governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behavior by repetition".[51] Moreover, such references automatically imply continuity with the past, with a suitable past.[52] These past events are usually referred to as traditions.[53]

It is possible to identify a group of arguments in tradition that have much in common with arguments in history.[54] One may find that certain arguments in tradition refer to the internal structure and established practices of a political community. These are usually references to the shared understanding of the features of democratic procedures, to notions of the republican form or federal structure of government, or to the architecture of the public discourse. Such arguments in tradition refer to established practices of a polity (political community).

On the other hand, some references to tradition point to commitments of a community that are not related to political practices, but rather to commitments pertaining to other spheres of human life. These references might be conceived as references to shared moral understandings of a polity. It is submitted, that

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51 HOBSBAWM, E.: Introduction, Inventing Traditions [in: *The Invention of Tradition*, Hobsbawm, E.—Ranger, T. (eds.) Cambridge, Cambridge University Press, 1983, 1.] According to Shils traditions have a higher standing then mere historical facts "by virtue of the quality which they acquire" (due to their) "state of communion with past powers." SHILS, E. A.: Tradition and Liberty, Antimony and Interdependence [in: SHILS, E. A.: *The Virtue of Civility, Selected Essays on Liberalism, Tradition, and Civil Society*, Grosby, S. (ed.) Indianapolis, Liberty Fund, 1997, 105].

52 HOBSBAWM, *op. cit.*, 1. The "relevant past" is especially important in case of revolutionary regimes. *Id. at* 2.

53 On tradition as a basis of legitimacy see WEBER, M.: *Economy and Society: An Outline of Interpretive Sociology* (Wirtschaft und Gesellschaft) Vol. 1, Roth, G.—Wittich, C. (eds.) Berkeley, University of California Press, 1978. 36. On traditional authority see *id at* 226–241. Hobsbawm distinguishes tradition from custom, custom being the driving force of traditional societies. HOBSBAWM, *op. cit.*, 2 (the core of tradition is invariance while custom is flexible, a custom adapts to the needs of the society).

54 MacIntyre argues that tradition is a historically extended, socially embodied argument. MACINTYRE, A.: After Virtue, a Study in Moral Theory (2nd ed.) London, Duckworth, 1992. 206–207. Cf. BARBER, *op. cit.*, 84 ("History can hardly count as tradition, then, for if it did, we could not criticize our historical conduct in the light of our traditions.").

when invoked by constitutional review *fora*, references to the long-held moral commitments of the community are similar to value arguments,[55] while references to long-established (political) practices of a polity are in essence identical with arguments in history.[56]

Like historical narratives, an argument based on the traditions of the polity is based on presupposition and prefiguration. Borrowing a term from Hobsbawm, traditions are "invented". They are construed as "responses to novel situations which take the form of reference to old situations, or which establish their own past by quasi-obligatory repetition".[57] Thus, one may find that a traditional narrative is teleological as well. In effect, arguments in tradition use history to situate the present in the social context of the community with the help of relevant past events.[58] Traditional narrative asserts a very strong claim of legitimization with reference to history.[59]

In response some may argue that traditional narratives are essentially different from references to history as their very existence presupposes a community: traditions are shared by a group of people, traditions are instrumental to the identity of a group. Very often arguments invoking traditions are legitimized by asserting that they are based on the well-established narratives of the community, or at least they are shared by the overwhelming majority of the actors. Many believe that the unarticulated premise of arguments in tradition is their pre-

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55 References to values and shared moral understandings of the community are not going to be discussed here.

56 Compare the above with Bobbitt's distinction between moral arguments and ethical arguments, ethical arguments being as set of "constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people. It is the characterization, or ethos, of the American polity...". BOBBITT, *op. cit.*, 92. Cf. LUBAN, D.: Legal Traditionalism, *Stanford Law Review*, 1991. Vol. 43, 1046–1047. Luban makes an attempt to distinguish arguments in history and tradition in constitutional reasoning. He finds that "Tradition is a heavily edited anthology of the past, and much of the past fails to participate in it at all". LUBAN, *op. cit.*, 1046.

57 HOBSBAWM, *op. cit.*, 2.

58 It is important to see that invoking a tradition is not about giving factual information on a previous performance, instead invoking tradition is an assumption that previous performance as presented is operative. Thus, traditions are presumptive and prescriptive. POCOCK, J. G. A.: Time, Institutions and Action: An Essay on Traditions and Their Understanding (in: POCOCK, J. G. A.: *Politics, Language and Time, Essays on Political Thought and History*, Chicago–London: Chicago University Press, 1989. 237).

59 HOBSBAWM, *op. cit.*, 12. Inventing traditions is formalization and ritualization. For an argument that references to history in legal argument invoke long-standing traditions, see GORDON (1996), *op. cit.*, 124 ("History supplies a set of basic ground rules").

dominantly majoritarian character. For them the alleged majoritarian features of references to the past seem to be of major significance in establishing the high esteem of such references in constitutional reasoning.[60] One shall however see that references to traditions are as much interpretive ('invented') as historical narratives. In a plural society, however, there is a multiplicity of actors and institutions that conceptualize the past.[61] Like historical narratives, references to traditions of the polity are construed along the predispositions of their authors. Thus, the validity of references to traditions of the polity in constitutional reasoning primarily depends on the appropriateness of the underlying historical data and not on the size of the group supporting it.[62]

In case one accepts that majoritarian character of traditional narratives, one may find that this feature undermines the legitimacy of references to tradition from the perspective of theories of democratic theories of government intending to accommodate judicial review. From the perspective of democratic theories of government this hint of majoritarianism makes references to the past legitimate when raised by judicial review *fora*. From the perspective of judicial review however, along the lines of an argument made by Ely, it makes little sense to invoke the value choices of the majority to protect a minority (a marginalized group of citizens) from rules established by the majority.[63]

As has been shown, rhetorics based on history and traditions of the polity are construed along a predetermined framework. If perceived so, arguments in history are not more objective than references to tradition. The preferences of the interpreter are present not only when she invokes the traditions of the polity (set of highly valued historical references), but also when she selects historical data

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60 BROWN: *op. cit.*, 205; WEST, R. L.: The Ideal of Liberty, a Comment on Michael H. v. Gerald D., *University of Pennsylvania Law Review*, 1991. Vol. 139, 1378.

61 POCOCK (1989), *op. cit.*, 240. Also, the time-consciousness of a heterogeneous society is complex. The concept of mulitplicity of social time was elaborated by Halbwachs in 1925 [HALBWACHS, M.: *Les cadres sociaux de la memoire* (1925)]. See also Bobbitt finding: "Within a legal culture, legal rules operate to actualize many possible worlds, some of which are inconsistent with others." BOBBITT, *op. cit.*, 179.

62 In many cases constitutional review *fora* are petitioned to protect rights or liberties of minorities. Examples are numerous in the jurisprudence of the Canadian Supreme Court in aboriginal cases.

63 ELY, J. H.: *Democracy and Distrust, a Theory of Judicial Review*, Cambridge, Mass., Harvard University Press, 1980. 69. For an argument that courts are not immune to majoritarian influences see FRIEDMAN, B.: Dialogue and Judicial Review, *Michigan Law Review*, 1993. Vol. 91, 586.

in support of a position. And as has been shown historical data are presented in an interpretive framework.

Based upon the above, one may also find that references to traditions of the polity are normative arguments, they assert the normativeness of the past. This normativeness derives from non-instrumental notions of loyalty, sympathy, authority and honor.[64] From this perspective it is easy to ascertain the similar characteristics of arguments in history and in traditions of the polity. Both arguments claim the normativeness of past events on a non-rational but reasonable basis.[65]

II.3 References to the past in constitutional reasoning revisited

The normativeness of narratives based on history and traditions is amplified when they are relied on in constitutional adjudication. They suggest or prescribe a standard of behavior the authoritative character of which is due to its past origins. If viewed so it is of secondary importance whether the past origins are traceable (as a concrete historical date), or immemorial (as in case of many traditions). The normativeness of arguments in history was established in opposition to the alleged objective and descriptive features of historical arguments. There is, however, a point where the normativeness of arguments in history and traditions of the polity is linked to objectivity.[66]

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64 *A Dictionary of Conservative and Libertarian Thought*, Ashford, N.—Davies, S. (eds.) London—New York: Routledge, 1991. 264–265. See also Shils submitting that reception of tradition is a submission to an unknown authority. SHILS, *op. cit.*, 112.

65 In this context the distinction was made by Raymond Aron. ARON, R.: The Forms of Historical Intelligibility (in: ARON, R.: *Politics and History*, New Brunswick—London: Transaction Books, 1984. 60).

66 There is a considerable disagreement among scholars whether and to what extent objectivity is possible in legal and constitutional argument. For denying the possibility of objectivity whatsoever see DWORKIN, R.: On Objectivity and Interpretation (in DWORKIN, R.: *A Matter of Principle*, Cambridge, Mass., Harvard University Press, 1985. 167–177). Dworkin argues that objectivity in legal argument and interpretation is impossible because it would suggest the existence of an external standard. Dworkin however suggest that when testing a proposition against an external standard legal argument internalizes that standard. In the essay Dworkin shows that it is impossible to show on an objective ground that slavery is wrong. *Id.* at 173–174. For a different view see Stavropoulos who suggest that in legal argument objectivity is a claim to establish whether a legal norm was applied correctly. STAVROPOULOS, N.: *Objectivity in Law*, Oxford, Clarendon Press, 1996. Stavropoulos' argument, however, does not seem to be able to respond to questions like how it is possible to determine whether vague clauses such as the due process clause was applied correctly.

It was suggested that the objectivity of historical narratives may not mean more than that the correctness of historical facts and data can be established.[67] It was also shown that writing (judicial opinions being a form of writing) turns traditions into facts.[68] This is the point where objectivity in a very limited, highly technical sense may become a check on the normativeness of these arguments. Narratives based on historical assertions can be discredited by showing that they are based on inappropriate data,[69] or if further data suggest a different interpretation. Thus, arguments in history and traditions may be tested against the correctness of the historical data on which they are based.[70] Failing that test may have an adverse influence on the normativeness of arguments in history and traditions of the polity.

As has been mentioned already, one of the major functions of arguments in history in constitutional reasoning is to reinforce continuity. As Pocock has shown, a written traditional narrative transmogrifies a social continuity represented by tradition into a multiplicity of institutional continuities.[71] The promise of continuity is exhilarating. It suggests stability and predictability, and from the perspective of legal analysis it is appealing for various reasons.[72] On the one hand it suggests that a judicial review forum acted within its long-established powers. Thus, the claim of continuity has a considerable legitimating affect. On the other hand the observance of continuity suggests adherence to the

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67 Although the methodological limits of that enterprise were also shown. One shall consider Pocock's assertion claiming that if there is no factual support for the existence of past or present usages, it is a myth. For a tradition to be intelligible there shall be a factual background. POCOCK (1989), *op. cit.*, 253–354.

68 On the relationship of traditions and documents to which they are tied see POCOCK (1989), *op. cit.*, 254–256.

69 Cf. POCOCK, J. G. A.: Burke and the Ancient Constitution: A Problem in the History of Ideas (in: POCOCK, *Politics* ..., 228). Pocock submits, that an immemorial constitution is not based on original principles, therefore it cannot be tested against them.

70 If so viewed one may see that arguments in history and traditions of the polity are on the dividing line of factual and normative claims. It might be seen that when a review forum treats arguments in history as facts and not as normative claims, the cutting edge of such references is taken away.

71 POCOCK (1989), *op. cit.*, 254–256.

72 Pritchard and Zywicki assert that arguments in tradition are economically efficient, as these arguments trace those rules that are socially accepted and have been tested over time. PRITCHARD, A. C.–ZYWICKI, T. J.: Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation, *North Carolina Law Review*, 1999. Vol. 77, 412–413.

basic tenets of the rule of law, i.e. a reinforcement of the fundamentals of constitutional government and a claim for stability.[73]

One may also argue that the ideal of continuity is closely linked to preserving the *status quo* and neutral judicial decision-making, two claims which are often intertwined:[74] "Historical interpretations that pretend to complete objectivity or neutrality inescapably conceal a political agenda, usually favorable to the *status quo*."[75] Neutrality and *status quo* are both very plausible terms used in scholarly literature and judicial opinions with multiple and somewhat indefinite meanings. It is beyond the ambitions of the present essay to explore the actual uses and possible meanings of these terms.

An often concealed feature of references to *status quo* was revealed by Judge Posner. Posner showed that *status quo* may mean the *status quo* of today, as well as the *status quo* of yesterday. References to history and traditions of the polity are more likely to preserve the *status quo* of yesterday than to reinforce a contemporary consensus.[76] Also, one may argue that a decision to maintain the present consensus implies a value choice *per se*, therefore it can be at best deferential in a sense, but not neutral.

Furthermore, preserving the *status quo* as a societal consensus has at least two highly problematic aspects. From an empirical perspective one may argue that ascertaining the contemporary societal consensus is impossible in the course of judicial decision-making.[77] Some may also add that it is not desirable for justices to engage in taking Gallup polls. And in any case, the notion of validity

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73 For an account of originalism which advocates stability as a major legitimating factor for established procedures in constitutional government see CLINTON, R.: Original Understanding, Legal Realism, and the Interpretation of 'This Constitution', *Iowa Law Review*, 1987. Vol. 72, 1262. ("This instrumentalist value in constitutional stability is not a concern with preserving the status quo; rather, it ensures that contemporary society respects the legitimacy of the constitutionally provided procedures for resolving disputes about the meaning and enforcement of its fundamental charter.")

74 See e.g. SUNSTEIN, C.: Lochner's Legacy, *Columbia Law Review*, 1987. Vol. 87, 974, 982.

75 SPITZER, A. B.: *Historical Truths and Lies about the Past*, Chapel Hill, University of North Carolina Press, 1996. 4. Spitzer suggests that arguments in history leave behind a politically altered historical discourse constrained by "brute facts".

76 POSNER, R.: *The Problems of Jurisprudence*, Cambridge, Mass., Harvard University Press, 1993. 444. Posner argues that new traditionalists want to preserve the status quo of yesterday.

77 For an argument that justices should consult the present social consensus see BROWN, *op. cit.*, 220 *et seq.* ("the interpreter will use judgment to gauge and evaluate the lessons of present tradition. Because different interpreters reflect different aspects of contemporary tradition, and thus bring different influences to the interpretative process, the political branches, representing the people, should consider these factors in selecting judges".)

of a historical narrative is independent of the consent of those on behalf of whom the interpretation is submitted.

A further concern, which receives little attention in jurisprudence, was raised by historians. Ball and Pocock warn lawyers about a political consequence of the use of arguments in history and traditions of the polity. The authors submit that in a historical narrative the "former state of the law would retain authority even as it was being shown as obsolete. The presumptions would be in its favor, and good reasons would have to be given for changing received interpretation."[78] As a consequence, the language of the law would be a language that the polity does not speak any longer.[79]

One shall nonetheless note that many of the above-mentioned aspects of arguments in history and traditions escape the attention of those who invoke them. As Miller noted, justices who argue tradition are aware of the fact that sometimes there is little meaningful continuity between the Framer's constitution and our present reality. Still, "the form of adherence to the past abides, perhaps because it helps fulfill some deep-seated psychic need".[80] Also, as has been already indicated, the reasons for resorting to arguments in history are numerous, even the legitimacy of some of those considerations might be questioned.

III Common Law Reasoning, Burke and Conservative/Liberal Ideals

III.1 Common law: the reason for repetition, if any

The jurisprudence of constitutional review *fora* operating in common law regimes presents special challenges for an analysis of arguments in history and traditions of the polity. Constitutional review *fora* invoke «common law» when they act in their constitutional capacity. A reference to common law might have numerous different, although sometimes overlapping, connotations. In the US and Canada the term common law may refer to a distinct body of legal norms present and applicable in the respective legal systems.[81] Some areas previously governed by

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78 BALL, T.—POCOCK, J. G. A.: Introduction [in: *Conceptual Change and the Constitution*, Ball, T.—Pocock, J. G. A. (eds.) Lawrence, Kan., University Press of Kansas, 1988].

79 BALL—POCOCK, *op. cit.*, 11.

80 MILLER, A. S.: *Toward Increased Judicial Activism, the Political Role of the Supreme Court*, Westport, Greenwood Press, 1982. 180.

81 As to the relationship of the Constitution and common law in the US, and to the role of the federal courts in this matrix, the leading case is *Erie Railroads v. Tompkins*, 304 U.S. 64 (1938).

judge-made law were constitutionalized[82] or legislative enactments were passed to govern them, while other spheres still remain under judge-made norms.[83]

In addition, references to "common law" as such may well stand for the common law of England. Thus, the phrase common law may refer to the legal system that had a strong influence on US and Canadian law and jurisprudence. The authoritative stature of the common law of England in these countries is not so obvious. On the one hand, the legal systems of the US and Canada are independent of the United Kingdom.[84] On the other hand, these legal systems

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In Canada the extent to which the Charter is relevant to problems governed by common law, is discussed as a question of application.

82 The constitutional stature of common law is governed by s.52 of the Canadian Constitution as refined by jurisprudence. In *R.W.S.D.U. v. Dolphin Delivery Ltd.* (1986) 2 S.C.R. 573 the Supreme Court per Justice McIntyre held that common law rules are subject to constitutional scrutiny to the extent common law norms form the basis of government action. See *R.W.S.D.U. v. Dolphin Delivery Ltd.* (1986) 2 S.C.R. 573, 598–599. The government action shall be subject to s.1 analysis under the Oakes test. The burden of proof is on the government. Constitutional scrutiny of common law rules was extended to private relationships in *Hill v. Church of Scientology of Toronto* (1995) 2 S.C.R. 1130. Private parties have to show that the common law rule violates Charter values (as opposed to Charter rights). In these cases, however, the standard of judicial scrutiny is lower than the *Oakes* test. In cases involving private action judicial examination is performed by balancing Charter values against principles underlying the common law rule in question. The burden of proof is on the party alleging the violation. See *Hill v. Church of Scientology of Toronto* (1995) 2 S.C.R. 1130, paras 95–98 (Cory J.).

83 It is especially so in the Canadian context where the Charter entered an operating, fully developed legal system, a legal system which was predominantly of common law origin. EVANS, J. M.: The Principles of Fundamental Justice, The Constitution and the Common Law, *Osgoode Hall Law Journal*, 1991. Vol. 29, 56.

84 The independence of the US dates back to the eighteenth century. Thirteen former colonies of the British Empire signed the Declaration of Independence in 1776. Canada was distanced from the UK by the *British North America Act*, 1867 and the subsequent *Statute of Westminster*, 1931. The *Canadian Charter of Rights* entered into force in 1982 in the framework of an overall constitutional reform scheme. The 1982 reform extinguished the power of the UK parliament to legislate for Canada, except in case of an express request from the Canadian federal government. For a concise account on the negotiations leading to the adoption of the *Charter* and their effect on Canadian national identity see WEINRIB, L.E.: Canada's Charter, Rights Protection in the Cultural Mosaic, *Cardozo Journal of International and Comparative Law*, 1996. Vol. 4, 398–403. For a comprehensive argument on Canada's sovereignty on the basis of the constitutional amendment process, the British concept of parliamentary sovereignty, and legal and constitutional theory see also OLIVER, P.: The 1982 Patriation of the Canadian Constitution, Reflections on Continuity and Change, *Revue Juridique Thémis*, 1994. Vol. 28, 875 (1994).

have strong ties with English common law.[85] Although US scholars tend to disagree concerning the extent to which the common law of England might be authoritative[86]—especially when concepts of common law are invoked to explore the Framers' probable intent—Bracton, Coke and Blackstone are often invoked in contemporary judicial opinions.[87] The views of these authors stand for evidence on an old, historical or traditional point, but do not represent good law.

Common law is often invoked in the US in cases concerning criminal due process, rules on search and evidence, despite the existence of constitutional and statutory provisions.[88] The law of free speech also provides frequent references. The rules applied by courts in the US today originate in English common law, which was then developed by US courts. In such cases English common law rules are not considered as legal norms in effect, but are used as factual evidence on history or tradition of the field.

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85 For differences between the US and the Australian perception of common law see DIXON, O.: The Common Law and an Ultimate Constitutional Foundation, *Australian Law Journal*, 1957. Vol. 31, 241. Dixon demonstrates that while for an Australian judge the common law is the corpus of decisions of all common law courts, for a US judge common law is comprised of the jurisprudence of US courts, and the decisions of courts in other common law jurisdictions are not considered to be law but facts. See also Justice Holmes in *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 533 (1927).

86 "The framers believed that their concept of a constitution broke decisively with the prior understanding they inherited from Britain. Yet, in one sense that break was less radical than it seemed." Since 1789 Americans have always possessed two constitutions: a written document and the "working constitution" constituted by a body of precedents, habits, understandings and attitudes that has shaped the operations of the federal machinery ever since. RAKOVE, J. N.: *Original Meanings, Politics and the Ideas in the Making of the Constitution*, New York, Vintage Books, 1997. 339.

87 For a complex account on Blackstone's influence in the United States see BADER, W. D.: Some Thoughts on Blackstone, Precedent, and Originalism, *Vermont Law Review*, 1994. Vol. 19, 5. For a comprehensive study see also BERMAN, H. J. : The Origins of Historical Jurisprudence, Coke, Selden, Hale, *Yale Law Journal*, 1994. Vol. 103, 1651.

88 In this regard due process cases are especially interesting, as under the Due Process clause the US Supreme Court adopted an attitude protecting long-standing traditions; however, under the Equal Protection clause the Court tends to abolish long-standing forms of discrimination, even to invalidate practices that were widespread at the time of the ratification and that were expected to endure. See SUNSTEIN, C.: Sexual Orientation and the Constitution, A Note on the Relationship between Due Process and Equal Protection, *University of Chicago Law Review*, 1988. Vol. 55, 1161.

References to common law may also be encountered in a third, more theoretical sense, as a reference to basic features of common law reasoning or attitude.[89] Such references and techniques however cannot be characterized as doctrinal arguments, as they go well beyond the limits of a theory of *stare decisis*,[90] in this sense the common law method is more a frame of reasoning.[91] On the surface such arguments claim that common law is inherently conservative, a doctrine which lays on stability and predictability.[92] The substance of such references is an appeal to common law reasoning conceived as reason tested on experience (repetition), the origins of which are ancient and immemorial.[93] This ongoing repetition is the source of continuity and stability, the fundamental characteristics attributed to common law. Theories of common law differ in construing the role and relationship of the passage of time and of experience in the development of common law.[94]

There is a strong line of argument originating in the works of Coke and Hale,[95] and resulting in the 17th century concept of the "ancient constitution" which in effect identifies common law with a set of customs of immemorial

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89 Justice Scalia argues that the US constitution is being treated like common law today and he questions the appropriateness of a common law judicial attitude. In SCALIA, A.: *A Matter of Interpretation, Federal Courts and the Law*, Princeton, Princeton University Press, 1997. 13, 40.

90 A concept of *stare decisis* though is certainly hiding behind all these claims.

91 As Horwitz remarked "(l)ike the effects of a common language on the structure of the thought, the common law tradition affects our sensibilities at almost pre-rational levels". HORWITZ, M. J.: The Changing Common Law, *Dalhousie Law Journal*, 1984. Vol. 9, 66.

92 See e.g. MURPHY, W. F.: *Elements of Judicial Strategy*, Chicago–London, The University of Chicago Press, 1964. 204.

93 See e.g. GIFFORD, D.: The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason, *Tennessee Law Review*, 1995. Vol. 62, 773 arguing that the institutions of Anglo-American law "are worthy of protection because the premises forming their foundations are true and timeless".

94 Cf. "the force of precedent has nothing obviously to do with the claims of tradition; and those claims, whatever their source and strength, do not derive from the claims of the past as such". LUBAN, *op. cit.*, 1047. See also Gordon arguing that while the New Right in the US represented by Chief Justice Rehnquist, and Justice Scalia among others rejects the classic common law adaptation of traditions, the justices are relying on authoritative commands from the past which look like positive law. GORDON (1996), *op. cit.*, 132.

95 A classic example is Coke's opinion in Calvin's case where he refers to the wisdom of forefathers. McConnell notes that Coke argue tradition against reason as a judge and favored reason against tradition as an MP. MCCONNELL, *op. cit.*, 179–180.

origin.[96] Pursuant to this understanding of common law the source of the substance of a legal norm shall not be examined, it is enough to adhere to the custom of application.[97] If perceived so, common law is simply prescription of behavior via repetition (i.e. tradition).[98]

The relationship of repetition and reason is complex and often debated. It is not to suggest that repetition confers action with the force of law, rather, the legitimacy of legal norms follows from the continuous application of these norms (empirical evidence of continuous application and social experience).[99] Some

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96 For a comprehensive account see POCOCK (1989), *op. cit.*, 213. Pocock argues that the concept of the ancient constitution is based on the identification of English law with custom. On the differences of the visions of government of the US Framers and the concept of ancient constitution see ROSE, C. M.: The Ancient Constitution vs. The Federalist Empire, Anti-Federalism from the Attack on Monarchism to Modern Localism, *Northwest University Law Review*, 1989. Vol. 84, 74.

97 Here it is sufficient to refer to MacCormick's remark: "there is a radical weakness in a doctrine of precedent according to which the binding authority of a decided case is entirely independent of the strength or validity of the justifying arguments employed in the case." MACCORMICK, N.: *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press, 1978. 136–137. See also *R. v. Gruenke* (1991) 3 S.C.R. 263. Chief Justice Lamer of the Canadian Supreme Court wrote for the majority that "(w)hile the appellant may well be correct in pointing out that English and Canadian courts have not, as a matter of *practice*, compelled members of the clergy to disclose confidential religious communications, this does not answer the question of whether there is a *legal* common law privilege for religious communications." (emphasis original).

98 POCOCK (1989), *op. cit.*, 228. This position is the one to which Edmund Burke converted. POCOCK (1989), *op. cit.*, 225. On Burke's familiarity with law see STANLIS, P.: *Edmund Burke, The Enlightenment and Revolution*, New Brunswick–London, Transaction, 1991. 8–13. See POCOCK (1989), *op. cit.*, 379 *et seq.* for the influence of Coke and Hale on Burke's concept of common law and tradition.

99 Justice Cardozo notes that while some distinguish between common law and custom, Blackstone does not. CARDOZO, B. N.: *The Nature of the Judicial Process* (1921) New Haven–London, Yale University Press, 1967. 59. BLACKSTONE, W.: *Commentaries on the Laws of England*, Vol.1, Chicago: Chicago University Press, 1979. 17. Blackstone provides the following definition: "ancient collection of unwritten maxims and customs, which is called common law". For an interesting account on the relationship of common law and custom see WATSON, A.: The Future of the Common Law Tradition, *Dalhousie Law Journal*, 1984. Vol. 9, 68. Watson demonstrates that as local customs were hard to ascertain, judges found it more reliable to read them in court record, no matter how that court discovered that custom. Note that Blackstone himself distinguishes general customs and particular customs, particular customs being the customs of specific regions. BLACKSTONE, *op. cit.*, 67. In the opinion of Justice Cardozo justices should look into customs not for emerging new rules, but for tests and standards

see repetition as a highly rational behavior and argue that certain actions would not be repeated over and over if they were not beneficial.[100] Others see repetition as an instance of evident compliance with the immemorial.[101] The other end of the spectrum argues that following certain patterns of behavior and attributing special significance to them constitutes a profoundly irrational element of the common law.[102] The dispute over the relation of repetition and reason however does not alter the fact that in a large number of cases references to common law do not rely on specific sources of legal authority, rather, they point to a long-existing trend or prevailing legal concept in self-contained terms.[103]

III.2 Burke, conservatives, liberals and the dead hand of the past

The basic features of common law reasoning were discovered and valued by Edmund Burke.[104] Burke applied the main attributes of common law reasoning in a larger context, to social and political developments.[105] In his *Reflections* he invoked the common law methodology to show how the observance of traditions contributed to stabile government in England, and how the rejection of traditions

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determining how established rules should be applied. CARDOZO, *op. cit.*, 60.

100 POCOCK (1989), *op. cit.*, 220.

101 Blackstone submits that "(t)o make a particular custom good, the following are necessary requisites. (1) That it have been used so long, that the memory of man runneth not to the contrary." Other criteria established are that the particular custom be continued, peaceable, reasonable, certain, compulsory and consistent. BLACKSTONE, *op. cit.*, 76–78.

102 See HOLMES, O. W.: *The Common Law* (1881) New York, Dover Publications, 1991, 35 ("precedents survive in law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view").

103 See HOLMES, *op. cit.*, 190 showing that many customs of the realm were in essence rules of common law. Today criminal due process decisions in the US and Canada may be overwhelmed with such references.

104 Burke learnt most from the commentaries of Blackstone. And he noted with appreciation: "I hear that they have sold nearly as many Blackstone's Commentaries in America as in England." Edmund Burke, Speech on Conciliation with America (1775).

105 "All the reformations we have hitherto made, have proceeded upon the principle of reference to antiquity, and I hope, may I am persuaded, that all those which possible may be made hereafter, will be carefully formed upon analogical reasoning, precedent, authority and example." BURKE, E.: *Reflections of the Revolution in France* (1790), O'Brien C. C. (ed.), London Penguin, 1986. 117. On analogy see also BURKE, *op. cit.*, 120.

led to questionable consequences in France.[106] Thus, his reasoning—a classic argument in tradition—is especially interesting for the present discussion.

Some commentators assert that Burke denied reason and valued faithful (cowardly) repetition.[107] If that is so, the Burkean concept of tradition and one even may say that the basic tenets of the common law method are severely undermined. Others however argue that Burke did not deny the role of reason in governments based on tradition; moreover, it is asserted that Burke believed that adherence to traditions is an instance of highly rational behavior.[108]

In the *Reflections*, Burke does not deny the role of human reason in changing government. Also, Burke does not deny the need for adjustment in established governments; he believed that governments shall be changed in order to survive.[109] In the process of change Burke attributes a central role to tradition. In the light of his anthropological presuppositions and his general concept of political affairs one may see that in his theory adherence to traditions does not presuppose or result in automated routines. Burke admits that there are a few men with exceptional talents and those people are capable of construing great theories of government. In his views politics is not a matter solely for abstract theories, but also for experiment, for testing theories in practice.[110] However, Burke

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106 Kronman notes that Burke's *oeuvre* offers a concept of tradition in response to real-life problems. Also, he noted that Burke introduced his theory in an age when the idea of adherence to traditions was not that appealing anymore. KRONMAN, A.: Precedent and Tradition, *Yale Law Journal*, 1990. Vol. 99, 1046–1047.

107 See e.g. BROWN, *op. cit.*, 212. ("Translated into the language of constitutional interpretation, the argument is that current judgments about the role of government under the Constitution must be made in conformity with the traditions of society. It suggests blind obedience.") MACINTYRE, *op. cit.*, 221. MacIntyre argues that Burke contrasted tradition with reason. In a similar vein Ackerman holds that the new Burkeans of US constitutionalism favor gradual development via precedents and ignore (wisdom in gradual evolution) the achievements of contemporary constitutional theory. A prominent figure of new Burkeanism is Bickel. ACKERMAN, *op. cit.*, 472–473. As for Bickel's position see BICKEL, A. M.: *The Morality of Consent*, New Haven, Yale University Press, 1975. 20.

108 MOORE, *op. cit.*, 269. (Moore assesses a number of arguments to show that Burke did not deny the role of reason in government.)

109 BURKE, *op. cit.*, 106. ("A state without the means of some change is without the means of its conservation. Without such means of change is might even risque the loss of that part of the constitution which it wished the most religiously to preserve.") See also *id.* at 280.

110 BURKE, *op. cit.*, 152 and also 258. ("The means taught by experience may be better suited to political ends than those contrived in the original project." *Id.* at 285.) See BURKE, *op. cit.*, 276 where he argues that a revolution can be accepted as an experiment, and tested by time. Although he despised revolution as a means of political change, he could accept

submits that aberrations of theory were corrected by experience in old establishments.[111] He also argues that ordinary men are reasonable and they have their wants and passions. And they are not going to restrain themselves unless there is external means to control them.[112] Burke believes that the best control on passions is the accumulated experience of many generations.[113] This arrangement assures the stability and predictability that are essential to human and humane existence.[114]

Burke's argument is based on reason tested on and constrained by experience over time and through many generations (tradition).[115] The common law method is apparent throughout his theory. He construes tradition as an effective and legitimate constraint on human passions on the one hand, and on imperfections of reason on the other. If so, it may be argued that Burke asserts an epistemic claim on behalf of tradition. According to Burke traditions shall be observed because the past knows better than the present generation what the truths of government are.[116] If construed so, one may see that Burke did not advocate mindless repetition, he did not deprive the recipients of tradition from their discretion based upon their experience of practical application.

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revolution as an (even necessary) experiment to break from tyranny. BURKE, *op. cit.*, 276.

111 BURKE, *op. cit.*, 285.

112 BURKE, *op. cit.*, 151. His anthropology is based on his perception of the French revolutionaries, who by Burke's great surprise were mostly lawyers. See *id.* at 129 et *seq.* (The behavior of the French revolutionaries may certainly be interpreted as a lesson tought by time.) He also refers to he arrogance of those who have never experienced wisdom greater than their own. *Id.* at 193. Cf. BLACKSTONE, *op. cit.*, 44. "The only true and natural foundations of society are the wants and fears of individuals."

113 BURKE, *op. cit.*, 152, 285. ("The science of government being therefore so practical in itself, in intended for practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life...." Id. 152.) His theory of accumulated wisdom is strongly tied to ideas about inheritance and the natural order of the world. See especially BURKE, *op. cit.*, 119–120.

114 BURKE, *op. cit.*, 265–266. As a retrospective finding one may even say suggest along these lines that although arguments in tradition are majoritarian *per se*, they tend to protect the minority from the sudden changes of attitude the majority may have.

115 Cf. Nagel arguing that the fundamental percepts of common law reasoning contradict the logic of the self-development of political tendencies. NAGEL, R. F.: *Constitutional Cultures, the Mentality and Consequences of Judicial Review*, Berkeley—Los Angeles—London, University of California Press, 1989. 19.

116 MOORE, *op. cit.*, 268.

Burke's views are usually considered as the standard conservative understanding of tradition in conservative political theory.[117] When it comes to authoritative references to history and traditions of the polity, liberals at the other end of the spectrum are likely to quote J. S. Mill on the dead hand of tradition. What conservatives view as stability, liberals are likely to name backwardness. What is the preservation of commonly shared values and experience for one, is the infringement of individual autonomy for the other.

Still, there are forceful attempts which try to show that reliance of traditions is not backwardness *per se*. Edward Shils is one of the major liberal advocates of the observance of traditions. He argues that a non-critical approach towards traditions is hostile to traditions themselves.[118] Instead, in a line of argument similar to that of Burke, he advocates knowing adherence to tradition and argues that in effect accepting traditions enhances rights, as it provides an a priori framework for safeguarding individual liberty.[119]

Conclusion

The above analysis suggests that arguments in history and traditions of the polity are normative claims, implying value judgments. Historical analysis provides a 'history of today'. Thus, one may find that a historical narrative is not descriptive but it is in essence normative.[120] In case one rejects the above positions, it is still the case that in a historical narrative the interpreter has a privileged position at the end of the past; the observer identifies herself with the problem and with the assertion that a solution to that problem is in sight.[121] Thus, instead of providing an objective, neutral justification, references to history and traditions of the polity are about construing the past for the purposes of present and future legal and constitutional reasoning. Historical examples are invoked to reinforce

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117 See YOUNG, E.: Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation, *North Carolina Law Review*, 1994. Vol. 72, 634. May that be so, one may still find that Burke himself used his argument in support of a liberal position in daily politics.

118 SHILS, *op. cit.*, 114 (traditionalism is hostile to tradition).

119 Note that Shils advocates loose patterns of traditions. SHILS, *op. cit.*, 105, 117.

120 ARON, *op. cit.*, 60. Aron notes that in the narrative history has a privileged position, but the approach is not rational only reasonable.

121 Otherwise the study of history would undermine its own legitimacy. ARON, *op. cit.*, 59.

norms of behavior in accordance with past examples, or to deter from a certain conduct using past analogies to model possible (undesired) outcomes.[122]

As references to history and traditions of the polity are forward looking, they might appear convenient to support future oriented reasoning which is insensitive to the outcome (to the decision in the case), exactly as neutral principles do. Historical narratives and references to traditions in particular offer themselves as suitable bases for principled judgment. This is one of the many reasons why they are so well-taken in legal and constitutional argument. However, one shall not be misguided: historical narratives are invented, thus, *per se* context-sensitive and result-oriented. This is why they cannot fulfill their initial promise of objectivity and neutrality. As historical narratives are teleological and normative they cannot give rise to principled legal and judicial decisions.[123] These findings might form the framework of understanding arguments in history and traditions in constitutional adjudication.

The analysis of the basic precepts of common law reasoning revealed how arguments referring to common law may mold with arguments in long-established legal principles or practices.[124] This technique of reasoning allows for reaffirming a rule without testing its substance even in the days of refined theories of precedent and *stare decisis*, a feature of common law reasoning that might be useful to keep in mind.[125] That is not surprising since it is one of the

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122 For a typology of the functions of historical narrative see WHITE (1993), *op. cit.*, 7 et seq. White distinguishes emplotment, formal argument and ideological argument.

123 On a different argument concerning the relationship of historical narratives and the need for stability and principled decision-making in constitutional law see DWORKIN (1986), *op. cit.*, 365–369. Dworkin argues that historical narratives serve stability. According to Dworkin stability is an argument of political normativity. He argues that in rights cases considerations of stability shall be secondary to claims of justice.

124 Krygier argues that this is true for legal reasoning in general, whether or not operating by the common law method. As the essence of legal reasoning is to support a present position with examples and analogies drawn from sources of the institutionalized past. KRYGIER, *op. cit.*, 257–258.

125 For an example see Jesse Choper's argument: it is not a question anymore if judicial review is a legitimate exercise of judicial power under the US constitution; the review power has been exercised for a long time, and today the issue is to delineate the proper scope of the judicial review power. See CHOPER, J.: *Judicial Review and the National Political Process, a Functional Reconsideration of the Role of the Supreme Court*, Chicago—London: The University of Chicago Press, 1980. 63. For a summary on the origins of US judicial review in a common law context see CORWIN, E.: *The Doctrine of Judicial Review*, Princeton, Princeton University Press, 1914. 28 *et seq.* analyzing the landmarks from Dr. Bonham's case via *Hylton v. U S*, 3 U.S. 171 (1796). A recent US example is the plurality opinion in *Planned Parenthood v. Casey*,

most intriguing tasks to establish a theory of *stare decisis* that allows departure from precedent while maintaining a sense of continuity.[126] As has been revealed recently, the doctrine of *stare decisis* is "to accord an authoritative status to tradition in 'supplementing or derogating from' the constitutional text".[127] It means that common law courts argue on the basis of established traditions and history when, while clearly departing from precedent, they intend to maintain the impression of continuity and fidelity to the text or structure of the constitution.[128] These findings are indeed supported by a review of the views of Burke on the nature of common law reasoning and on the role of tradition in shaping governments.

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505 U.S. 833 (1992) reaffirming the holding of *Roe v. Wade*, 410 U.S. 113 (1973). Justice O'Connor writing for a plurality refused to reexamine the central holding in Roe and upheld it for the reason that it has been applied for over 20 years. It is argued that the reason for such a facade *stare decisis* is the loss of faith of the judiciary. Hellman calls these attempts a prudential approach to *stare decisis*. See HELLMAN, D.: The Importance of Appearing Principled, *Arizona Law Review*, 1995. Vol. 37, 1116–1117. Such prudential considerations may also be interesting from the perspective of a study of judicial candor. See IDLEMAN, S. C.: A Prudential Theory of Judicial Candor, *Texas Law Review*, 1995. Vol. 73, 1307. Idleman submits that a doctrine of precedent is a sub-issue of judicial candor. *Id.* at 1311.

126 Nonetheless, it is important to see that "(judicial) (l)aw-making is not restricted to overruling precedent. Law-making occurs when a precedent is distinguished and also when a precedent is followed. ... Law-making can and does occur whether or not a court considers itself to be bound by its own prior decisions". BALE, G.: Casting off the Mooring Ropes of Binding Precedent, *Canadian Bar Review*, 1980. Vol. 18, 259.

127 See MONAGHAN, H. P.: Our Prefect Constitution, *New York University Law Review*, 1981. Vol. 56, 382, on quote in CAMPOS, P.: Against Constitutional Theory (in: Campos, P. F.—Schlag, P.—Smith, S. D.: *Against the Law*, Durham: Duke University Press, 1996. 124.) For a similar finding in the context of the jurisprudence of the Warren Court in the US see FRIEDMAN, B.—SMITH, S. B.: The Sedimentary Constitution, *University of Pennsylvania Law Review*, 1998. Vol. 147, 24–26. Before *Roe v. Wade*, 410 U.S. 113 (1973) the Warren Court used history and originalism in general as liberal tools of broad interpretation of a right; history was a device to preserve continuity but to depart from precedent. After Roe originalism became a conservative tool: it is more than an interpretive methodology, it is a political movement. For recent references to history and tradition as limitations on constitutional claims in the US see e.g., 478 U.S. 186 (1986), *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). As it was noted, these references to tradition narrow down the scope of non-textual liberties entitled to constitutional protection. BROWN, *op. cit.*, 204.

128 While most authors argue for a strict and principled reliance on the requirements of *stare decisis*, others argue that overruling precedents is an ordinary means of self-correction. For the later view see e.g. LEE, Th. R.: *Stare decisis* in Historical Perspective: from the Founding Era to the Rehnquist Court, *Vanderbilt Law Review*, 1999. Vol. 52, 647.

This essay was not intended to resolve the basic tensions and predispositions attached to arguments invoking the past. Rather, it attempted to show that arguments in history and traditions may be formulated to preserve a certain institutional arrangement and also to change it; that the very same references may foster as well as limit individual liberty; that the same set of references is capable to delineate as well as to increase the legitimate choices of the interpreter, thus the scope of judicial review. In the context of constitutional adjudication it means that arguments invoking the past may be devices for activism as well as for deferentialism. It is also suggested that legal reasoning, or at least common law reasoning, has methodological features which may call for references to the past. Thus, arguments invoking the past shall be analyzed in a more comprehensive framework that also responds to teleological aspirations, claims of normativeness and continuity raised or masked by these references. As one shall always keep in mind: the past does not bind the present unless the present chooses to be bound.[129]

129 WOFFORD, J. G.: The Uses of History in Constitutional Interpretation, *University of Chicago Law Review*, 1961. Vol. 31, 523.

ACTA JURIDICA HUNGARICA
2000 41 Nos 1-2, pp. 79-109

1216-2574 / 2000 / USD 5.00

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Humanitarian Intervention: A Historical and Theoretical Overview

Introduction

Notwithstanding the fact that ever since the ancient times a number of authors have dealt with the problem of wars aimed at the enforcement of requirements of humanity, the question of humanitarian intervention gained legal character only around the seventeenth and eighteenth centuries following the emergence of human rights as well as the actual birth of international law.[1]

Obviously, due to the lack of a sufficient legal basis and background, in relation to centuries prior to those designated above it is inexpedient to discuss the issue of humanitarian intervention, although it has to be admitted that several historical events has showed startling similarities with this legal phenomenon. As a consequence, in an attempt to come across the first legal definitions and theories

1 "International Law as a law between sovereign and equal States based on the common consent of those States is a product of modern Christian civilisation, and may be said to be about four hundred years old." OPPENHEIM, L.: *International Law: A Treatise.* Vol. I. Peace. Eighth Edition, ed. by LAUTERPACHT, H. (hereinafter: Lauterpacht's OPPENHEIM). London: Longmans Green & Co., 1955. 72.

concerning humanitarian interventions it is enough to travel approximately three or four hundred years back in time.

However, because of the significant changes in the system of international law that took place in the meantime, any research focusing on the specific topic of the present study has to be carried out within the framework of two or three appropriately set up historical and legal epochs. The first period had lasted from the "beginning" till 1945, when a new era began in international law highlighted by the United Nations (UN) and bringing in its wake fundamental legal changes, the effects of which are still dominant for the time being. To put it simply and briefly, according to the core provisions of contemporary international law, states are strictly forbidden to use or threat of force against one another as well as to intervene in the domestic affairs of any other state.[2] Since such comprehensive legal prohibitions on forcible and arbitrary inter-state conducts and measures had never existed prior to 1945, and since every situation has to be judged on grounds of the law in force at the time when it took place, the setting up of the epochs referred to above seems to be not only advisable, but also inevitable.

Furthermore, I also marked the line of time at March 1999, when NATO's Kosovo intervention—which, as commonly known, was commenced without a prior authorization obtained from the UN Security Council—started. This passionately debated event was, of course, far from being as significant as the adoption of the UN Charter and naturally did not mean the dawn of a new era, still—for the very topic of this study—it *might* have indicated further, forthcoming changes in international law, especially in the legal opinion concerning humanitarian intervention.

It also has to be noted here in the introduction that the phrase "humanitarian intervention" was and is, in fact, used in different senses. Therefore it is necessary to throw light upon the relevant questions, especially when facing that some of these divergent concepts hide not absolutely false but at least somewhat debatable approaches.

According to the dual or in other words broader definition, the phrase embraces both the actions of a state carried out outside the borders of its territory and aimed at the protection of its nationals whose fundamental human rights are gravely violated by another state and the interventions commenced in order to protect the rights and liberties of foreign nationals suffering from blatant ill-treatment and extreme violations of human rights perpetrated by their own state. (This latter segment of the broader definition is the so-called classical notion of

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2 See *inter alia* the Charter of the United Nations, Articles 2(4) and 2(7), and UN General Assembly Resolutions 2131(XX), 2625(XXV) and 3314(XXIX).

humanitarian intervention.) However, only but a few scholars believe that state actions with beneficiaries who are actually the nationals of the intervening state itself and described above in the first half of the broader definition are genuine humanitarian interventions.[3] Interventions of this kind can be seen as a result of the extraterritorial nature of a state's personal supremacy and the violation of this supremacy by another state—therefore—as a result of both the violation of sovereignty and flagrant non-observance of human rights rather than any action aimed at the enforcement of human rights and derived from the minimum standards of civilization as well as the basic principles of humanity.

Consequently, interventions such as the Etebbe hostage rescue mission of the Israeli elite troops in 1976 (*Operation Jonathan*) or the unsuccessful *Operation Eagle Claw* carried out by the United States in Iran in 1980, can be seen as not humanitarian ones, but rather as special manifestations of self-protection or self-defence on behalf of the intervening state. This concept stands much closer to legal reality, although it gives rise, in my view, to further concerns. Article 51 of the UN Charter governing self-defence contains the following provision: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member State of the United Nations..."[4]

The wording of the cited provision reveals that the right of self-defence is reserved by the Charter, as an exception to the comprehensive ban on use of force, for cases of aggression, a condition which is certainly not met when another state gravely violates the fundamental human rights of a state's nationals. State sovereignty, of course, suffers damage in instances like this, however a military rescue operation cannot be carried out with reference to Article 51 of the UN Charter interpreted in a *stricto sensu* manner. "Therefore, this variant of humanitarian intervention is—contrary to a widespread view in the literature—neither compatible with the UN Charter provisions nor justified by today's customary international law."[5]

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3 See for instance HENKIN, L.—PUGH, R. C.—SCHACHTER, O.—SMIT, H.: *International Law: Cases and Materials.* American Casebook Series. St. Paul, Minnesota: West Publishing Co., 1980. 922–924. For an interesting, yet—in my opinion—far too broad view on collective humanitarian intervention which even embraces measures such as the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) by the UN Security Council, see BUERGENTHAL, T.: *International Human Rights in a Nutshell.* Second Edition. St. Paul: West Publishing Co., 1995. 5.

4 Charter of the United Nations, Article 51. Italics mine.

5 BEYERLIN, U.: "Humanitarian intervention," in *Encyclopedia of Public International Law*, edited by R. BERNHARDT (hereinafter: ENCYCLOPEDIA). Amsterdam—New York—Oxford:

It should be mentioned in a nutshell that there exists a concept—the broadest of all—according to which the category of humanitarian intervention, besides those actions discussed above, also involves various forms of state conducts of interventional or influential nature, but lacking the element of use of force. Nevertheless, this view is shared by only a few jurists.[6]

As far as my opinion is concerned, I entirely share the view, represented by for example Manouchehr Ganji—an eminent author in the fields of political science and international law, particularly human rights law[7]—interpreting the notion of humanitarian intervention in the strictest manner. As I have already indicated, I am convinced that any intervention aimed at the protection of own nationals neither bears primarily humanitarian considerations nor does it show up the characteristics of self-defence. Interestingly enough, these actions can be derived from a domestic legal relation—which is not lacking in international significance, though—, namely from the obligations and responsibilities of states in relation to their own nationals.

For the considerations and views expressed above, in the forthcoming substantial part of the present study I will focus only on the classical notion of humanitarian intervention that, once again, involves the key element of protection provided to foreign nationals.

Humanitarian Intervention in the Era Prior to the Establishment of the United Nations

For the purposes of this study, the relevant features of traditional, pre-Charter international law can be summarized in two major points: (i) in this period *ius ad bellum* was a generally recognized and consistently implemented right, so as a result, forcible interventions were not prohibited at all; (ii) fundamental human

North-Holland Publishing Company, 1982. 214.

6 There is an outstandingly apt remark used by Guggenheim to illustrate such actions: "*plutôt platonique*". See GUGGENHEIM, P.: *Traité de Droit International Public.* Tome I. Genève: Librairie de l'Université, George & C^ie^ S. A., 1953. 290. The group of those who take "humanitarian representations"—or in other words "humanitarian protests"—as instances of humanitarian intervention includes for example Antoine Rougier and Ellery C. Stowell. Cf. ROUGIER, A.: "La Théorie de l'Intervention Humanité." *Revue Général de Droit International Public* (1910) 475–478; STOWELL, E. C.: *Intervention in International Law.* Washington D. C.: John Byrne & Co., 1921. 63–195.

7 GANJI, M.: *International Protection of Human Rights.* Genève—Paris: Librairie E. Droz—Librairie Minard, 1962. 9–44.

rights and freedoms, especially the freedom of religion,[8] slowly gained international acceptance and started to spread irresistably all over the civilized world.

Due to the work of natural lawyers as well as to the need for and the emergence of human rights, a legal form was assumed by a number of ancient moral rules, such as the one which prescribed that in proportion to one's capabilitites, it was an acceptable, moreover an honourable deed to help the others, since for a human being nothing could be more important than another human being. The common bonds stretching between all human beings had made the requirement of providing help to those in need a general moral principle: a view carried into effect as early as in the time of antiquity and emphasized by several outstanding philosophers and authorities already in those centuries. Marcus Tullius Cicero said that interpersonal connections of men were by themselves a sufficient ground to provide help to someone else.[9] It was affirmed by Lucius Annaeus Seneca who claimed that human beings had been created in order to mutually help one another.[10] Also noteworthy is the opinion of Ambrosius that the force which protected the weak was "pure justice" itself.[11]

It would be false to believe, though, that it was exclusively the antique moral values that had a vigorous influence on the early theorists and theories of humanitarian intervention. One should not underestimate the significant effects of Christian values and Christianity in general transmitted towards the emerging law of nations at that time, mainly by the famous representatives of the so-called Spanish school such as Francisco de Vitoria.[12]

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8 See for instance: 1645 Treaty of Linz, Article I; 1648 Treaty of Westphalia, Articles XXVIII, XLIX and CXXIII; 1699 Treaty of Carlowitz, Article XIII; 1720 Treaty of Constantinople; 1739 Treaty of Belgrade; 1774 Treaty of Kutchuk-Kainardji, Articles VII, XIV, XVII and XXIII; 1815 Eight Powers Declaration on the affairs of Helvetian Confederation, Article IV; 1815 Federal Constitution of Germany, Articles XVI and XVIII; 1856 General Treaty of Paris, Article IX; 1878 Treaty of Berlin, Article LXII; 1885 Congo Act, Article VI.

9 See CICERO: *De Finibus Bonorum et Malorum.* III. 19. 64; CICERO: *De Officiis.* II. 5. 16; Digesta, 1. 1. 3.

10 SENECA: *De Ira.* I. 5.

11 AMBROSIUS: *De Officiis.* I. 13.

12 Cf. GAJZÁGÓ, L.: *A nemzetközi jog eredete, annak római és keresztény összefüggései, különösebben a spanyol nemzetközi jogi iskola* [The Origins of International Law, its Roman and Christian Relations, Especially the Spanish School of International Law] Budapest: Stephaneum Nyomda, 1942. Vitoria, a Spanish Dominican monk, was allegedly the first to use the phrase "intervention on grounds of humanity" in his lecture at the University of Salamanca in 1539. Ch. MEIER: "Koszovó és a Pax Americana: Kérdések és töprengések egy helyzetről" [Kosovo and Pax Americana: Questions and Thoughts Concerning a Situation] *Európai Szemle* Vol. X. No. 3 (1999), 94.

Briefly speaking, as a result of the development of international law that took place during the seventeenth and eighteenth centuries the above-mentioned moral and religious norms were incorporated into its system, providing from the very beginning explicit, but sometimes abusive, legal grounds for starting wars. However, despite the mentality beamed from morality and religion towards international law and because of the absolute notion of sovereignty as well as the dominant character of *ius ad bellum*, it used to be somewhat irrelevant what the *casus belli* of a particular armed conflict was. This statement can be accepted with a reservation, though. Since international law, as well as law in general, has always been inseparable from certain elements of morality and religion, from a certain point of view it had significant importance whether or not a war had been started for justifiable reasons and purposes.

Without going into detailed discussion of the traditional "just war" theories,[13] but based upon the above-mentioned mentality of the historical period in question, it can be stated that humanitarian interventions were typically looked upon as instances of just wars, although the thorough examination of their particular occurrences in history may raise questions regarding the noble and purely altruistic motivations of the "armed samaritans". Naturally, an equality sign cannot be put between the notions of just war and humanitarian

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13 On the theory of just war see for instance AUGUSTINE: *The City of God Against the Pagans* (Cambridge Texts in History of Political Thought). Edited by R. W. DYSON. Cambridge: University Press, 1998; GROTIUS, H.: *De Iure Belli ac Pacis* [On the Rights of War and Peace]. English translation by F. W. KELSEY. Classics of International Law, Vol. 2. No. 3, 1925. Liv. I. Ch. II, Liv. II. Ch. XXII–XXVI, Liv. III; JOHNSON, J. T.: *Ideology, Reason and the Limitation of War: Religious and Secular Concepts, 1200–1740.* Princeton: Princeton University Press, 1975; JOHNSON, J. T.: *The Quest for Peace: Three Moral Traditions in Western Cultural History.* Princeton: Princeton University Press, 1987; JOHNSON J. T.: "Just War," in *The Blackwell Encyclopaedia of Political Thought*, edited by D. MILLER, J. COLEMAN, W. CONNOLY, A. RYAN. Oxford: Basil Blackwell, 1987; LOCKE, J.: *Second Treatise of Government.* Indianapolis: Hackett Publishing Co., 1980. Ch. XVI; OPPENHEIM, L.: *International Law: A Treatise.* (hereinafter: OPPENHEIM) Vol. II. War and Neutrality. London–New York–Bombay: Longmans, Green, and Co., 1906. 70; PHILLIPS, R. L.–CADY, D. L.: *Just War vs. Pacifism (Point/Counterpoint).* Rowman & Littlefield, 1995; ROUSSEAU, J.-J.: *The Social Contract.* English translation by M. CRANSTON. Penguin Classics, Penguin USA, 1987. Ch. IV; VATTEL, E., de: *Le Droit des Gens ou Principes de la Loi Naturelle. Appliqués à la Conduite et aux Affaires des Nations et des Souverains* [The Law of Nations or Principles of the Law of Nature. Applied to the Conduct and Affairs of Nations and Sovereigns]. Vols I–III, Vol. III. Translation of the edition of 1758 by C. G. FENWICK. Washington: Carnegie Institution of Washington, 1916. Liv. III. Ch. III–IV; WALZER, M.: *Just and Unjust Wars: A Moral Argument with Historical Illustrations.* Second Edition. Basic Books, 1992.

intervention. In my view, the relationship that existed between these two categories was a relation of a part to a whole: every humanitarian intervention was a just war, but not every just war was started and waged on grounds of humanity.

Hugo Grotius, the "father of international law", also made an attempt to tinge the category of wars. In the theory thus set up, in the form of a just war started in the interest of foreign nationals, one can come across humanitarian intervention, as well. Although Grotius did not offer a definition of this phrase, some conclusions can still be drawn from what he did say about it. Naturally, his starting-point was the principle of sovereignty, a general rule with a few exceptions thereto, such as excesses committed by a state against its nationals which amounting to a certain level of gravity might cry out for a foreign, external intervention.

In the case when a breach of a fundamental right is undoubted, said Grotius, no-one can approve of it on the basis of equity, and in such cases the "rights of human society" cannot be ruled out. Moreover, even if the doctrine that citizens are not allowed to take arms against their sovereign was recognized, it would not mean that no-one else could do that for them. It is, he explained with an apt comparison, as if a trustee acted for his ward.[14]

The dominant position that had been enjoyed by morality and religion in law was cut short by the spread of positivism, which introduced a new way of legal thinking with the legal norm in its centre. Positivism certainly had a tremendous impact on international law—and within its realm—on the doctrine of humanitarian intervention, too. In the process of changing approaches from natural law theories to positivism the works of Emeric de Vattel represented some sort of transition. The views expressed by this outstanding jurist, whose influence on the subsequent writers can only be compared to Grotius', excellently illustrated the changes that had occurred in the general legal opinion concerning humanitarian intervention as well as the striking duplication of its assessment (i.e. morality and religion *contra* law). In his work of fundamental importance entitled *Le Droit des Gens* he laid down the following principle: "The laws of the natural society of Nations are so important to the welfare to every State that if the habit should prevail of treating them under foot no Nation could hope to protect its existence or its domestic peace, whatever wise and just and temperate measures it might take. [...] Hence all nations may put down by force the open violation of the laws of the society which nature has established among them, or

14 See GROTIUS, *op. cit.*, Liv. II. Ch. XXV. Pt. VIII. § 3.

any direct attacks upon its welfare. But care must be taken not to extend these rights so as to prejudice the liberty of Nations."[15]

It appears that Vattel "considers it permissible to succour a people oppressed by its sovereign, but does not appear to sanction any of the analogous grounds of intervention",[16] although this legal and theoretical ground was somewhat weak. Furthermore, the fact that Vattel did not recognize any other similar forms of intervention clearly indicates the influence of positivism and the sovereignty-centred approach of the time.[17]

At the end of the nineteenth and early in the twentieth century, presumably due to its freqent occurrences, the issue of humanitarian interventions burst into the centre of the attention of international lawyers and the related questions gained rather considerable importance. I venture to say that this period was the "golden age" of humanitarian intervention, both in theory and in practice. During these decades, the legal category in question was mentioned and dealt with in almost every significant work and textbook on international law,[18] and authors in general made positive comments in connection, having not forgotten to give voice to the relevant concerns, though. One can notice, however, that the "in

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15 VATTEL, *op. cit.*, Introd., §§ 22–23.

16 HALL, W. E.: *A Treatise on International Law.* Eighth Edition, ed. by A. P. HIGGINS. Oxford: Clarendon Press, 1924. 344. (Footnote No. 2.)

17 See VATTEL, *op. cit.*, Liv. II. Ch. IV. § 54.

18 See *inter alia* FENWICK, C. G.: *International Law.* London: George Allen & Unwin, Ltd., 1924. 154–155; HALL, *op. cit.*, 341–345; LISZT, F., von: *Das Völkerrecht systematisch dargestellt.* Zwölfte Auflage. Bearbeitet von M. FLEISCHMANN. Berlin: Verlag von Julius Springer, 1925. 119, 122; OPPENHEIM, *op. cit.*, Vol. I. Peace, 1905. 186–188; PRADIER-FODÉRÉ, P.: *Traité de Droit International Public Européen et Americain. Suivant les Progrès de la Science et de la Pratique Contemporaines.* Tome I. A. DURAND et G. PEDONE-LAURIEL (éditeurs). Paris, 1887. 560, 651–664; ROUGIER, *op. cit.*; STOWELL, *op. cit.*; STRUPP, K.: *Theorie und Praxis des Völkerrechts. Ein Grundriß zum akademischen Gebrauch und zum Selbststudium.* Berlin: Verlag von Otto Liebmann, 1925. 29, 31. In the Hungarian literature of the period concerned, see APÁTHY, I.: *Tételes európai nemzetközi jog* [Positive European International Law]. Budapest: Franklin-társulat, Magyar Irod. Intézet és Könyvnyomda, 1878. 112; IRK, A.: *Bevezetés az új nemzetközi jogba* [Introduction to New International Law]. Második kiadás. Danubia Kiadás, 1929. 111; KISS, I.: *Európai nemzetközi jog* [European International Law]. Eger: Érsek-Lyceumi Kő- és Könyvnyomda, 1876. 95, 228–229; TASSY, P.: *Az európai nemzetközi jog vezérfonala* [The Main Trend of European International Law]. Kecskemét: Scheiber József könyvkereskedő, 1887. 46; WERNER, R.: *A természetjog vagy bölcseleti jogtudomány kézikönyve. Összehasonlító tekintettel a tételes jog intézkedéseire* [Natural Law or a Textbook of Theoretical Legal Sciences. With Comparative Regard to the Measures of Positive Law]. II. kötet. Pest: Heckenast Gusztáv, 1869. 336–338.

favour" attitude showed a constantly decreasing tendency: the initial years highlighted by noble enthusiasm had been first replaced by a period of more considerate opinion-forming, whereas by 1945 the relevant legal concerns almost completely faded the positive features of interventions on grounds of humanity.

T. C. Lawrence of England, for instance, spoke about humanitarian intervention with outstanding passion and with little respect to the principle of rule of law in those early days: "[A]n intervention to put a stop to barbarous and abominable cruelty is a high act of policy above and beyond the domain of law. [...] Should the cruelty be so long continued and so revolting that the best instincts of human nature are outraged by it, and should an opportunity arise for bringing it to an end and removing its cause without adding fuel to the flame of the conflict, there is nothing in the law of nations which will brand as wrongdoer a group of states which might undertake to intervene."[19]

One of the most illustrious personalities of the French literature, Antoine Rougier, in a bit of a contrast to other authors of his time, tried to enumerate the legal grounds and preconditions of humanitarian interventions. According to him such actions could only be seen as lawful if the conditions below were met:[20]

(i) The violations of human rights which, in fact, serve as a ground for the intervention must be committed by state authorities. Nevertheless, atrocities perpetrated by individuals or groups of individuals (i.e. non-state agents) may also provide a justifiable cause to intervene providing that the state itself is unable or unwilling to put an end to the violance.

(ii) It is the fundamental human rights (*droit humain*) which are gravely violated, not the positive domestic law. The catalogue of these rights, in Rougier's view, is as follows: the right to life, the right to liberty and the principle of legality.

(iii) Finally—a rather uncertain condition—, "the intervention must unify certain conditions of expediency".

The initial "enthusiasm" in relation to humanitarian intervention decreased in the largest extent during the 1920s. The date is not at all surprising and the causes seem to be evident. The common and—let us add—somewhat suspicious *casus belli* of all nineteenth century humanitarian interventions was the protection of Christian minorities living and suffering under Ottoman

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19 LAWRENCE, T. C.: *The Principles of International Law.* Fourth Edition. London: Macmillan and Co. Ltd., 1910. 129.

20 Cf. ROUGIER, *op. cit.*, 468–526.

domination, however, because the Ottoman Empire had almost entirely been driven out of the Balkans, no further wars could have been started with such motivations. Furthermore, the international community, apparently having seen the never before experienced scale of destruction caused by World War I, loathingly abandoned—at least for a while—the use of force and also made an attempt to outlaw *ius ad bellum*. These factors and circumstances led to more low-key and realistic writings in the legal literature concerning humanitarian intervention.

Significant is the cautiousness with which L. Oppenheim, who was of German descent, nevertheless regarded as an anglophone scholar, wrote about humanitarian intervention in 1905. "That the Powers have in the past exercised intervention on these grounds there is no doubt. [...] But whether there is really a rule of the Law of Nations which admits such interventions may well be doubted. Yet on the other hand, it cannot be denied that public opinion and the attitude of Powers are in favour of such interventions, and it may perhaps be said that in time the Law of Nations will recognize the rule that interventions in the interest of humanity are admissible, provided they are exercised in the form of a collective intervention of the Powers."[21] As for the aim of these interventions, he noted that it was about compelling a state which was gravely violating human rights to establish a legal order of things within its boundaries in order to guarantee to its citizens "an existence more adequate to the ideas of modern civilization".

What else could reflect more illustratively the theoretical fog surrounding humanitarian intervention than the striking differences between the opinions of Oppenheim and Gerhardt von Glahn? Glahn, a professor emeritus at the University of Minnesota-Duluth, worded it in such way: "Humanitarian intervention has been traditionally a part of customary international law and almost all writers as well as governments believed that the coming of the League of Nations had not affected this type of intervention."[22]

Like most of those dealing with international law, I myself also doubt that humanitarian intervention has ever formed a part of customary international law. The essential *opinio iuris* has never been established and in the face of sporadic and highly selective occurrences, no-one can state that such interventions have ever become a general practice within the domain of relations among the

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21 OPPENHEIM, *op. cit.*, Vol. I. Peace. 186.

22 GLAHN, G., von: *Law Among Nations: An Introduction to Public International Law*. Fifth Edition. New York—London: Macmillan Publishing Company—Collier Macmillan Publishers, 1986. 160.

members of the international community. Notwithstanding this, Glahn's statement was adequate from a certain point of view: for humanitarian intervention to become a part of customary international law most of the necessary legal and historical requirements were indeed given at the turn of the nineteenth and twentieth centuries, however this opportunity of a lifetime was never seized.

A number of international lawyers made tremendous efforts at the beginning of the twentieth century to find some kind of positive legal basis in order to legitimize humanitarian intervention and to replace the increasingly less acceptable moral and religious grounds provided by natural law theories. As a consequence of the change of emphasis pointing towards legal positivism and parallel to the quest for possible purely legal grounds, attempts were made to derive the right of intervention in the interest of humanity from a modified notion of sovereignty. According to this new concept, sovereignty was not absolute anymore, but relative—restricted by a number of factors such as human rights. This aspect of sovereignty is still bearing considerable importance for those forwarding arguments in favour of humanitarian intervention nowadays.

It was the American Edwin M. Borchard who said "where a state under exceptional circumstances disregards certain rights of its own citizens over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on grounds of humanity. When these 'human' rights are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute, at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled."[23] What had been expressed by Borchard, in my view, was way ahead of its time and is still applicable for the time being. The latter part of this outstanding definition can easily be applied to describe certain contemporary peace-keeping and peace-building operations as consequences of humanitarian catastrophes such as the activities and joint efforts of the international community in Kosovo via UNMIK and KFOR.

In the view of Ellery C. Stowell, Borchard's fellow-countryman, "[h]umanitarian intervention may be defined as the reliance upon force for the justifiable purpose of protecting the inhabitants of another State from treatment which is so arbitrary and persistently abusive as to exceed the limits of authority within which the sovereign is presumed to act with reason and justice".[24] Concerning the grounds of intervention, he expressed the following: "Although

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23 BORCHARD, E. M.: *The Diplomatic Protection of Citizens Abroad.* New York: The Banks Law Publishing Co., 1922. 14.

24 STOWELL, *op. cit.*, 53.

an occasional instance of intervention in the case of an extraordinary crime or transgression may properly be classed as humanitarian and justified in law, ordinary intervention to prevent injustice is in practice restricted to instances in which a government has been guilty of persistent misconduct or a prolonged neglect to remedy unjust conditions within its jurisdiction."[25]

I think a consistent and careful consideration of Stowell's approach involving the elements "crime" and "transgression" would lead to an idea of a humanitarian intervention of *quasi* reprisal or punishment nature.

International punishability of blatant violations of human rights also showed up—although not as spectacularly as in Stowell's theory—in the works of William E. Hall of England. The most unique feature of his approach was, however, that in an implicit way, without mentioning the category by its name he wrote about the admissibility of humanitarian intervention—a state action "in restraint of wrongdoing", notably to battle immoral acts which are "so inconsistent with the moral character of a human being as to constitute a public scandal, which the body of states, or one or more states, are competent to suppress".[26]

Nevertheless, due to the relative nature of morality, this statement is valid only with certain restrictions. As Hall pointed it out: "To some minds the excesses of a revolution would seem more scandalous than the tyranny of a sovereign. [...] While however... [an] intervention to put down a popular movement or an uprising of a subject race is wholly forbidden, intervention for the purpose of checking gross tyranny or of helping the efforts of a people to free itself is very commonly regarded without disfavour. Again, religious oppression, short of a cruelty which would rank as tyranny, has ceased to be recognized as an independent ground of intervention..."[27]

It is worth mentioning at this point that the international recognition of humanitarian interventions based upon religious considerations (i.e. to ensure free exercise of religion for religious minorities) decreased in direct proportion to the losing of territories by the Sublime Porte on the Balkans. It is a barely questionable fact that the European Great Powers acting in Concert and taking advantage of the shortcomings and uncertainties of international law, made the

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25 *Ibid.*, 145.
26 HALL, *op. cit.*, 342.
27 *Ibid.*, 343.

doctrine serve their own purposes and ambitions, and after they had exploited and abused it, abandoned it.[28]

A particularly famous character of the Anglo-Saxon literature on international law, Charles G. Fenwick, who believed that religion-based interventions were still legitimate even in the early twentieth century, made the following comments on humanitarian intervention: "The phrase is not a scientific one, and it refers, it would seem, to those general principles of conduct which are held particularly sacred by all nations. The question is presented, what international right on the part of third states can arise in the consequence of the brutal and inhuman conduct of a state toward its own citizens?"[29] Since the answer would be "intervention on grounds of humanity"—as humanitarian intervention used to be called—one may derive the conclusion that Fenwick handled this legal category as a right, as a "summary punishment inflicted upon a state which has disgraced the society of nations by its misconduct".[30] (It may be observed that, besides Hall's approach, the findings of Fenwick corresponded to Stowell's approach to some extent, as well.)

Uses of force for humanitarian purposes can (could) also be justified by further theories, such as the one declaring the right of states to protect the moral values and emotions and/or properties of their nationals should these be subject to violations by another state. I respectfully disagree with this approach, especially with its first segment, as in practice it would imply that particular conducts of states are decisively dependent on domestic public opinion and public demands, a totally unacceptable cause for action under international law, not only nowadays, but also in the past. In order to offer yet another example for possible grounds of intervention, I would like to add that states can (could) be urged to use force when facing a humanitarian crisis by virtue of the common bonds or—as already referred to—common religion of the peoples concerned.

The above enumeration of facts, situations and acts which may open a way for a humanitarian intervention, containing only a few legal specifics, once again throws light on the extreme vagueness surrounding the discussed category. It

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28 In contrast it is interesting to recall what Lord Phillimore said at the end of the nineteenth century concerning religion-based interventions: "The practice (if it can be called such) of Intervention of one Christian State on behalf of the subjects of another Christian State upon the ground of religion, dates from the period of Reformation...". Lord PHILLIMORE, R.: *Commentaries Upon Intenational Law.* Vol. I. Third Edition. London: Butterworths, 1879. 621–622. See also: HALL, *op. cit.*, 344–345. (Footnote No. 2.)

29 FENWICK, *op. cit.*, 154.

30 *Ibid.*

was Hall, for instance, who forwarded concerns that one of the weakest points of the doctrine was that "sentiment has been allowed to influence the more deliberately formed opinions of jurists".[31] Fenwick also wrote about the relevant problems: "Obviously this right of intervention is particularly susceptible to abuse, and is in urgent need of more specific definition by international statutory legislation."[32] The most serious misgivings were—and still are—related to the so-called unilateral interventions, though. "The true criticism of intervention is not that it has been in every case without justification... For action is always arbitrary where the intervening state is the judge of its own case. Even where the results are good, the use of force by the individual state must inevitably weaken the general structure of order and justice in the community" of nations.[33]

As a summary of the pre-Charter period of humanitarian intervention, it is advisable to go through its characteristics derived from the factual and legal circumstances of those one-time actions:[34]

(i) Notwithstanding the fact that the actions of the intervening Powers were overwhelmingly motivated by humanitarian considerations, those were justified in all cases by treaty stipulations, such as Article IX of the 1856 Treaty of Paris or Articles XXIII and LXII of the 1878 Treaty of Berlin.

(ii) All actions were commenced with the aim of providing protection to persecuted religious minorities living under foreign occupation and carried out by the European Powers acting in Concert.

(iii) The religious beliefs and institutions of the intervening states were identical to those of the protected minorities (i.e. Christianity).

(iv) Resorts to the use of force were always preceded by peremptory demands addressed to the "target state" in a hope of reaching a peaceful way of settlement.

(v) These peremptory demands were in all cases rejected, mostly with referral to the notion of sovereignty as well as to the exclusive jurisdiction of states over their own nationals. (This is in accordance with the position that "prior to the UN

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31 HALL, *op. cit.*, 343.

32 FENWICK, *op. cit.*, 154. Grotius also dealt with the issue of abuses. He readily disclaimed any charges by saying that a right does not cease to exist just because villains abuse it: pirates also sail, bandits also use weapons. See GROTIUS, *op. cit.*, Liv. II. Ch. XXV. Pt. VIII. § 4.

33 FENWICK, C. G.: "Intervention: Individual and Collective." *American Journal of International Law* (hereinafter: AJIL), Vol. 39 (1945), 658.

34 Cf. GANJI, *op. cit.*, 37–38. Ganji drew his conclusions after having examined a few occurrences of humanitarian intervention, namely the following crises: Greece (1830), Syria (1860), Crete (1866/8), Bosnia and Herzegovina (1877/8) and Macedonia (1903/8).

Charter most human rights violations were regarded as falling within the exclusive jurisdictional domain of the State where the violation occurred, rather than within the sphere of international law".[35]) However, at this point, I would like to draw the attention to the first paragraph of this enumeration. What is contained under paragraph (i) indicates that certain human rights, partially due to the international treaties mentioned therein, gained international recognition and became of international concern for the first time in the very same historical period.

Following the 1920s, in the threatening shadow of World War II, one could not come across major writings on humanitarian interventions, but such works re-emerged after 1945 from pens of a new generation of authors and reflecting the mentality of a completely new era.

Humanitarian Intervention in the UN-era

As I have already indicated, the establishment of the UN hallmarked fundamental changes in international law. The prohibition of the use of force enshrined by the UN Charter is of absolute, comprehensive and *erga omnes* character, and as such, naturally apply to humanitarian intervention as well.

"Under the rubric of 'humanitarian intervention' the military power of single nations, or of several acting jointly once was considered by some authorities as proper for succoring groups oppressed by their own government. Since the coming of the UN Charter, Articles 2, 42 and 51 of which forbid the use of force except in self-defence or on orders of the Security Council, far less can be said for the validity of humanitarian intervention."[36]

As a result of these changes in its legal environment the unsteady structure of this category—which had been hotly debated even prior to the adoption of the UN Charter—immediately collapsed, its more or less accepted position in the system of international law vanished. Nevertheless, the need for such actions in practice, rather than decreasing, started to become increasingly urging, especially in the face of the so-called revolution of human rights and the flagrant

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35 SUNGA, L. S.: *Individual Responsibility in International Law for Serious Human Rights Violations.* International Studies in Human Rights, Vol. 21. Dordrecht—Boston—London: Martinus Nijhoff Publishers, 1992. 66.

36 CAREY, J.: *UN Protection of Civil and Political Rights.* Procedural Aspects of International Law Series, Vol. 8. Syracuse University Press, 1970. 22.

and systematic violations of these rights often resulting in unspeakable suffering and an incredibly high death-toll. Under such ambiguous conditions international lawyers have made efforts to (re-)define humanitarian intervention after 1945.

At the time of writing (Summer 2000), exactly 55 years—slightly more than half a century—have passed since the UN was established. As far as this period is concerned one may state in general that in its beginning, right after World War II, the academic interest towards humanitarian intervention proved to be negligible. Due to the crises which have been and still are flaring up all over the world without end as well as the shocking pictures of never before seen atrocities broadcast by mass media to every home, however, around the 1960s and 1970s humanitarian intervention, the ancient category which almost sank into oblivion reincarnated. It got back into the centre of attention only in the 1990s though, when several consecutive international humanitarian actions took place leading to equivocal consequences. The "renaissance" of interest was further strengthened by the adoption of a series of legally binding human rights documents (e.g. the two International Covenants of 1966), the developing process of globalization and the emergence of new theories emphasizing the restricted, relative nature of sovereignty.

In my opinion an additional tendency can be observed with respect to the tone of writings in connection with humanitarian intervention. This tendency is somewhat parallel to those outlined above. As it will appear in the following, at first most of the authors—for understandable reasons, standing on the firm ground of positivism—judged these interventions with extreme criticism. This reluctant approach lasted until the world witnessed violations of human rights only comparable to those that had been perpetrated during World War II and beheld the inability of existing human rights protection mechanisms to cope with these outrageous acts. At this stage—approximately in the late 1990s—the critical and rejecting viewpoints started to make the way for a new policy underlining the need for the defining and legal regulation of humanitarian intervention. This phenomenon might mark the dawn of a very new, third period in the history of military actions in the protection of human rights.

In 1946 Hersch Lauterpacht, the famous native of Galicia—in line with what Oppenheim had said some decades earlier—put his views into words in the following manner: "The doctrine of humanitarian intervention has never become a fully acknowledged part of positive international law. But it has provided a signpost and a warning. It has been occasionally acted upon, and it was one of the factors which paved the way for the provisions of the Charter of the United

Nations relating to fundamental human rights and freedoms."[37] Interestingly enough, it was nearly ten years later that Oppenheim's treatise on international law edited and partially re-written by Lauterpacht contained this approach: "There is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is *legally permissible*."[38]

In the light of the two definitions above, one may raise the embarrassing question: Did Lauterpacht revise his opinion in the meantime in such a way that it turned almost to the opposite extreme? Charging him with inconsistency would be a mistake. If one examines the latter statement thoroughly, one may observe that the authority did not, in fact, speak about the legality of humanitarian intervention, but rather about its legal permissibility, which is a phrase not completely synonymous to "legality". Such wording, especially in legal literature where every word can bear fundamental importance and may change the meaning of a sentence, cannot be taken no account of. Consequently, it would not be adequate to state for good that Lauterpacht was unquestionably in favour of humanitarian interventions, although his above (latter) definition can be found among the *ad autoritatem* arguments in nearly all writings on this particular topic in contemporary legal literature.

A further virtue of Lauterpacht's approach was that it provided some sort of a scale to measure the lower limit of permissibility of an intervention. According to this scale the intensity of atrocities must elevate to a degree that "shocks the conscience of mankind" in order to open a way for an external intervention. Despite all of its uncertainties, this precondition has also been admitted by several international documents, such as the 1998 Rome Statute of the International Criminal Court (ICC).[39]

It is noteworthy that the 1992 edition of Oppenheim's works—this time edited by Sir Jennings and Sir Watts—the part dealing with humanitarian intervention shrank further, while new and substantial remarks can be read only in the

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37 LAUTERPACHT, H.: "The Grotian Tradition in International Law." *The British Yearbook of International Law* (1946), 46.

38 Lauterpacht's OPPENHEIM, *op. cit.*, 312. Italics mine.

39 See the Rome Statute of the International Criminal Court. Adopted by the UN Conference of Plenipotentiaries in Rome on 17 July 1998. Preamble, para. 2.

footnotes. This phenomenon, by the way, is not unique and surprising at all, but is a general feature of the relevant literature for the time being. The comments contained by the above-mentioned volume represent a return to Oppenheim's original approach, but of course clearly indicate the present circumstances, as well. "If humanitarian intervention is ever to be justified, it will only be in extreme and very particular circumstances."[40] The list of these circumstances, according to the authors, are as follows:[41]

(i) Compelling and urgent situation of extreme and large-scale humanitarian distress.

(ii) The territorial state is unable or unwilling (since it caused it) to cope with the situation.

(iii) The competent organs of the international community cannot provide a fast and effective response to the needs brought along by the situation.

(iv) The intervention has no practicable alternatives.

(v) The question whether active resistance on behalf of the territorial state is likely to be expected.

(vi) The action must be proportional, both with respect to its duration and to the aims pursued, to the needs raised by the humanitarian emergency.

"In short, it would have to be peaceful action (which need not exclude it being carried out by military personnel) in a compelling emergency, where the transgression upon a state's territory is demonstrably outweighed by overwhelming and immediate considerations of humanity and has the general support of the international community."[42] The question is how the international community can express its approval. Through resolutions of the UN Security Council acting under Chapter VII of the UN Charter? Through resolutions of the UN General Assembly desirably adopted by the overwhelming majority of member states of the UN? By resorting to the hotly-debated resolution entitled "Uniting for Peace"? Or by other means of expressing will? UN Security Council authorization is undeniably the only way for a lawful action, but the Security Council's position in certain cases may not truly represent the opinion of the international community. Nevertheless, in the light of the current system of international law based upon the UN Charter, the rest of the possible answers

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40 Sir JENNINGS, R.—Sir WATTS, A. (eds.): *Oppenheim's International Law.* Vol. 1. Peace, Introduction and Part 1. Ninth Edition. Longman, 1992. 443. (Footnote 18.)

41 Cf. *ibid.*

42 *Ibid.*

does not seem to be legally admissible. At this point, however, I would not go into further discussion of this issue for it will be dealt with later on.

As already referred to, due to its practical occurrences, such as e.g. India's intervention in Pakistan in 1971, the academic interest towards humanitarian intervention livened up in the 1960s and 1970s, resulting in heated debates. The motto of these debates might as well have been the eminent English expert, Ian Brownlie's following remark: "[It is] extremely doubtful whether a right of humanitarian intervention still survives".[43]

Other scholars opposed Brownlie's categorical statement, but they did not go as far as to accept the lawfulness of humanitarian intervention. Richard B. Lillich, the frequently-quoted American scholar's train of thought threw light on the dilemma experienced by academics: "If, as Falk has remarked, the 'renunciation of intervention does not substitute a policy of non-intervention; it involves the development of some form of collective intervention', then concomitantly the failure to develop effective international machinery to facilitate humanitarian interventions arguably permits a state to intervene unilaterally in appropriate situations. Writing a decade ago, Roning wisely observed that 'it is as useless to outlaw intervention without providing a satisfactory substitute as it was to outlaw war when no satisfactory substitute was available'. He also posed the difficult question, which becomes more relevant every year, 'whether refusal to compromise on the principle of absolute non-intervention will not threaten the very principle itself'. [...] Although Brownlie does not consider this question, events during the past decade reveal a widening 'credibility gap' between the absolute non-intervention approach to the Charter which he espouses and the actual practice of states."[44]

Ganji, swimming against the main stream in a certain sense, explicitly agreed with those who argued in favour of the permissibility of humanitarian intervention. "The theory of humanitarian intervention is based on the assumption that States in their relation with their own nationals have the international obligation to guarantee to them certain basic fundamental rights... these rights are so essential and of such high value to the human person that violations by any State cannot be ignored by other States. This assumption would authorize intervention by other States, in case of flagrant denial of these rights by any State to her own citizens."[45]

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43 See BROWNLIE, I.: *International Law and the Use of Force by States.* Oxford: Clarendon Press, 1963. 338–342.

44 HENKIN–PUGH–SCHACHTER–SMIT, *op. cit.*, 924.

45 GANJI, *op. cit.*, 9.

Although an increasing number of experts has made the theory of humanitarian intervention their own, in the second half of the 1980s there was—using the words of Glahn—still "a sharp difference of opinion among both scholars and governments". Glahn believed that in case practices or actions labelled as revolting by morality and decency went on in a state despite the protests by the neigbouring states, considerations of humanity outweighed the principle of non-intervention. He also added that it seemed, humanitarian intervention was yet again justified if official atrocities occurred (such as the Cambodian genocide) along with the inability of the UN to intervene by use of force.[46]

The most special feature of his viewpoint was that it veered back to some extent to theories of natural law, since it—retiring from the purely positivist approaches—did not mention rights and obligations, but rather resorted to the notions of morality and decency which has been seldom used since the turn of the century.

Kosovo: Debates Reborn

As I have already mentioned, the debates regarding to humanitarian intervention were given a new stimulus by humanitarian crises and the international responses thereto which took place in the 1990s. However, it was NATO's 1999 Kosovo military action called *Operation Allied Force*, commenced without a prior UN Security Council authorization and seen by many as an instance of humanitarian interventions, that gave a boost to these disputes.

Besides the fact that the legal literature was flooded with relevant writings and the category which had been handled harshly suddenly got in the glare of publicity, NATO's intervention and the way it happened, at the same time, further increased the concerns of sceptics and representatives of the so-called non-interventionist views. Issues with reference to the UN Security Council were

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46 GLAHN, *op. cit.*, 160. As it is enshrined in Glahn's approach, genocide is only one—but perhaps the most blatant one—of the causes of a humanitarian intervention. It is noteworthy that the Open Society Institute coupled with the Independent International Commission on Kosovo organized a seminar entitled "Kosovo: Is Peace Possible?" 3–4 April 2000 in Budapest, Hungary. On this event the author of the present study had the honour to take part in the activities of the workshop chaired by Richard A. Falk, professor of Princeton University, dealing *inter alia* with the task of defining humanitarian intervention. When the issue of possible grounds came on the agenda, a consensus was reached on that it would not be advisable to link humanitarian intervention exclusively to genocide. The set of causes should be broader than that.

given a special emphasis, *pro* and *contra* arguments were and still are clashed in the course of the international debate. In this last chapter those general remarks which have been made in connection with humanitarian intervention during the above-mentioned discussions will be introduced (it falls outside the scope of the present study to deal with the NATO action itself). While reading the forthcoming comments, let us not forget that they, in fact, reflect the current attitude towards humanitarian intervention within the circles of international law.

Bruno Simma, a well-known German professor, was one of the first international lawyers to put pen to paper after the commencement of airstrikes against the Federal Republic of Yugoslavia. Representing a clearly positivist approach, he was on the opinion that "if the Security Council determines that massive violations of human rights occurring within a country constitute a threat to the peace, and then calls for or authorizes an enforcement action to put an end to these violations, a 'humanitarian intervention' by military means is permissible. In the absence of such authorization, military coercion employed to have the target state return to a respect for human rights constitutes a breach of Article 2(4) of the Charter".[47]

From what Simma said, at least in my view, the following chain of conclusions can be drawn. For the time being humanitarian intervention, as a general rule, is unlawful.[48] More precisely, it is unlawful if it is not authorized by the UN Security Council in accordance with the relevant provisions of the UN Charter. (As for Article 51, it would be difficult to imagine an intervention—especially one of humanitarian nature—carried out as a reply to an aggression, in a state of self-defence.) If these actions are lawful only within the framework provided by Article 42—as the case indeed stands nowadays—then I think it is irrelevant what an intervention of such nature is called: "enforcement action" or "humanitarian intervention". As a consequence, the category of humanitarian intervention is, so to say, wiped up and dissolved in the "melting pot" of the absolute ban on use of force. It seems that the principal aim of the non-interventionist school has been achieved: humanitarian intervention exists no more.

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47 SIMMA, B.: "NATO, the UN and the Use of Force: Legal Aspects." *European Journal of International Law* (hereinafter: EJIL) Vol. 10. No. 1 (1999), 5.

48 It should be added that Simma also admitted the importance of moral considerations: "Could it not be that 'humanitarian interventions', now undertaken in the spirit of ensuring that Srebrenica does not happen again, as it were, deserve a friendlier reaction also on the part of international lawyers?" *Ibid.*

Notwithstanding, with regard to the frequent paralysed states of the exclusive depositary of legitimate use of force, the UN Security Council, which usually occurs in the worst possible moments—as it is well illustrated by the example of Kosovo—, a reaffirming solution to the problem has not been thus reached. All what the international community can gain by adopting such an approach is the mummification of the present system of international law as a seemingly satisfactory implementation of the principle of the rule of law. I am not questioning that it is the only practicable plan nowadays, however—in the face of the present conditions—I would not risk to make the same statement with respect to the future. Could it not be that the lessons of Kosovo are that the preservation of existing international mechanisms of questionable efficiency would undermine the rule of law, rather than strengthen it? *Summum ius summa iniuria.*

I believe, the below conclusion of the United Kingdom Foreign Office confirms my doubts in connection with the relationship between the UN Security Council—of which the United Kingdom is a permament member—and humanitarian intervention: "In essence, therefore, the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law."[49]

The above position of the United Kingdom's Foreign Office was formulated in 1986 when the world had not yet witnessed the horrors of Bosnia, Somalia, Rwanda or Kosovo, just to mention a few examples of humanitarian crises in the 1990s. Simma did not mention it, but the attitude of the United Kingdom—judging from its actions at least—might have changed in the meantime. In support of this I would like to quote what Prime Minister Tony Blair said on 23 March 1999, one day before the starting of the Kosovo air operation: "We must act: to save thousands of innocent men, women and children from humanitarian catastrophe, from death, from barbarism and ethnic cleansing by a brutal dictatorship..."[50] To put it in an overly simplified and provocative way: as governments' opinions change, so changes international law. Of course a change in international law cannot be achieved overnight. We will see until when the commitment of the most powerful states to ensure respect for human rights—an obligation also

49 United Kingdom Foreign Policy Document No. 148, reprinted in British Yearbook of International Law (1986) 614.

50 Statement by Prime Minister, Tony Blair, in the House of Commons, Tuesday, 23 March 1999. In: WELLER, M.: *The Crisis of Kosovo 1989-1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities.* International Documents & Analysis, Vol. 1, Cambridge: Documents & Analysis Publishing Ltd., 1999. 495.

provided for in Articles 55 and 56 of the UN Charter—will last. If long enough, it may result in changes in the attitude towards humanitarian intervention, as well.

The Kingdom of Belgium, for instance, seems to explicitly favour the doctrine of humanitarian intervention. The only weak point of the following Belgian opinion having been presented in the course of the so-called Yugoslavia cases before the ICJ is that it involves a rather challengable, restrictive interpretation of Article 2(4) of the UN Charter: "The purpose of NATO's intervention is to rescue a people in peril, in deep distress. For this reason the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State."[51]

Responding to Simma's article, Antonio Cassese, one-time president of the International Criminal Tribunal for the former Yugoslavia (ICTY), made these observations on humanitarian intervention: "In the current framework of the international community, three sets of values underpin the overarching system of inter-state relations: peace, human rights and self-determination. However, any time that conflict or tension arises between two or more of these values, peace must always constitute the ultimate prevailing factor."[52] Although, later on in his writing, he made these findings—which apparently opposed any forms and occurrences of the use of force—relative by saying that "positive peace" (i.e. the fulfillment of the requirements of justice) ought to prevail over "negative peace" (i.e. absence of armend conflicts).

In addition, Cassese formulated a number of criteria, which in his view, would justify a humanitarian intervention even if carried out in the absence of a UN Security Council authorization. These criteria are as follows:[53]

(i) Grave breaches of human rights taking the form of crimes against humanity resulting in deaths of hundreds or thousands taking place on the territory of a state committed or permitted by the central governmental

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51 ICJ: Legality of Use of Force (Yugoslavia v. Belgium). "Facts and Past History", presented by the Representative of the Government of the Kingdom of Belgium (CR 99/15 (translation)—uncorrected; at 3 p.m., Monday, 10 May 1999).

52 CASSESE, A.: "Ex iniuria ius non oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" *EJIL*, Vol. 10. No. 1 (1999), 24. In conjunction with Cassese's cited study, see also CASSESE, A.: "A Follow-up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*." *EJIL*, Vol. 10. No. 4 (1999), 791–795.

53 See *ibid.*, 27.

authorities, or because the legitimate government is no more in control of the situation and thus cannot halt the perpetrations of these crimes.

(ii) In the latter case it must be proved that the state is unable to put an end to atrocities. However, if human rights violations are committed by governmental authorities, it is an essential requirement that these authorities have constantly refused any kind of co-operation with the UN or any other international organization, or has not observed and complied with various appeals, recommendations or decisions thereof.

(iii) The UN Security Council, due to lack of unanimity among its permanent members, is not able to give a proper response to the crisis (but perhaps declares the situation a threat to international peace and security).

(iv) All peaceful measures have been resorted to and proved ineffective prior to the use of force.

(v) A group of states, but never one "hegemonic Power", decides to take over and stop the ongoing acts of violence outlined above. Their action is desirably supported, or at least not opposed by the overwhelming majority of the member states of the UN.

(vi) The use of military force must be proportional to, both with respect to its duration and the means resorted to, the violations to be halted. The goals of the intervention are limited and cannot go beyond the mere aim of restoring respect for human rights. The more blatant the atrocities are, the more intensive and immediate may be the military response thereto.

I am convinced that the above system of criteria formulated by Cassese is one of the most precise and adequate in the line of similar enumerations. For this reason I would like to devote special attention to and deal with it in detail.

A special value of the enumeration is that it handles the exhaustion of peaceful remedies and the rejection of co-operation with (humanitarian) international organizations as two separate issues. Without further comments on the activities of international organizations (humanitarian assistance), I wish to note that I think there exists some sort of a symbiosis, a partial causality link between these actions and humanitarian intervention itself. The application of military coercion usually takes place after the initial attempts to provide humanitarian aid having failed for lack of consent on behalf of the territorial state, but as soon as the use of force ends, humanitarian organizations take the floor.[54] It is, in fact,

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54 Let us not forget that humanitarian assistance cannot bring along the violation of sovereignty—which is a necessary element of humanitarian intervention—, thus it requires a consent of the state concerned. See: MILLS, K.: "Sovereignty Eclipsed? The Legitimacy of

one of the goals of humanitarian interventions to create the circumstances under which these organizations can exercise their functions. Briefly speaking, the peaceful and military measures applied in the interest of humanity are not at all far from one another, moreover in certain cases they are interdependent.

It is among the most fundamental rules of international law that the UN Security Council bears primary responsibility in the field of international peace and security.[55] However, as already discussed above, this principal organ cannot fulfil its duties if one or more permanent members exercise the veto power. According to Cassese, in extreme cases involving atrocities outlined under the first point of the list, the UN Security Council can be by-passed and a group of states may take the initiative and stop the violations by use of force, should the majority of member states be not opposed to such an action. In this respect, in my view, the states willing to undertake a humanitarian intervention should first resort to the famous UN General Assembly Resolution "Uniting for Peace".[56] Despite the fact that it is a controversial instrument any recommendation passed in accordance with it would provide considerable legitimacy to a military intervention. Moreover, the spirit enshrined by Resolution "Uniting for Peace" is also reflected in and backed up by the ICJ's Advisory Opinion of 20 June 1962 concerning Certain Expenses of the United Nations.[57] An indirect use of Article 2 of the UN General Assembly Resolution 3314(XXIX) on the Definition of Aggression can also be made, in case the Security Council later on decides in favour of the humanitarian intervention.[58]

Humanitarian Access and Intervention." *Journal of Humanitarian Assistance* (http://www-jha.sps.cam.ac.uk/a/a012.htm reposted on 4 July 1997).

55 See Article 24 of the UN Charter.

56 "...if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security". UN General Assembly Resolution 377(V) adopted on 3 November 1950, para. 1.

57 "Under Article 24 the responsibility of the Security Council in the matter was 'primary', not exclusive. The Charter made it abundantly clear that the General Assembly was also to be concerned with international peace and security." See ICJ: Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion of 20 July 1962.

58 "The First use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed

In the relevant—but unfortunately somewhat limited—Hungarian literature, László Valki writing about the Kosovo crisis questioned the usefulness of the Resolution "Uniting for Peace": "It is thus questionable whether the Alliance's airstrikes would have had a higher legitimacy, if the General Assembly would had agreed to them by two-thirds majority. Why should, let us say, Vanuatu, Saint Lucia or Lesotho, or maybe Afghanistan, Iraq, Iran, Libya, Syria and Belarus have been asked what their opinions on Milosevic's policy were?"[59]

Bearing in mind Professor Valki's approach, I would respectfully like to raise a few questions, but—for lack of space—leave the task of answering them to every distinguished reader. Would, for instance, Lesotho's opinion have mattered more if she had been a member of the UN Security Council at that time? If yes, is not it a bit awkward, a bit contrary to the principle of the sovereign equality of states? As for another aspect of the issue: Is not any use of force and blatant violations of human rights a matter of international concern? Then why should the members of the international community not be asked about their opinions? In the specific case of Kosovo and a hypothetical application of the Resolution "Uniting for Peace" with respect thereto, would an asking for opinion have concerned only Milosevic's policy or also its international consequences as well as the form an appropriate international response should have taken? And finally: Is not it better not to rule out for the international community, in such cases, the possibility of saying "no"?

Following this brief train of thoughts and returning to Cassese's enumeration, it would be advisable to add a sixth requirement to the list, according to which the a humanitarian intervention should result in an actual and significant improvement in the conditions of life of the formerly persecuted population. Furthermore, this outcome should be guaranteed and maintained, if necessary, by an effective international presence to prevent *inter alia* a vendetta-like retaliation. The adding of such a requirement—which, I admit, would be a less welcomed one, especially on the side of the intervening states—would bring along two further benefits: on the one hand, in addition to the relevant provisions of humanitarian

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would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity." UN General Assembly Resolution 3314(XXIX) adopted on 14 December 1974, Article 2. Italics mine.

59 JUHÁSZ, J.—MAGYAR, I.—TÁLAS, P.—VALKI, L.: *Koszovó: Egy válság anatómiája* [Kosovo: Anatomy of a Crisis]. Budapest: Osiris Kiadó, 2000. 274. On the contrary Boldizsár Nagy was of the opinion that, at first, the Resolution "Uniting for Peace" should have been resorted to by NATO. See NAGY, B.: "Hadban állunk?" [Are We at War?] *Élet és Irodalom* Vol. 43. No. 15 (16 April 1999), 3.

law,[60] it would provide yet another scale to judge proportionality and on the other hand, it would prevent that the intervening states, having faced the first signs of a possible failure, abort the mission and abandon the noble aims pursued.

Finally, Cassese wisely did not rule out the possibility of having other goals besides the primary humanitarian ones in an intervention. Such *inevitable*, but never hegemonic and selfish goals may include the restauration or maintenance of a region's stability, the restoring of economic relations, etc.

Jonathan I. Charney, professor at the Vanderbilt University School of Law, also made a summary of those criteria which are necessary for a humanitarian intervention to qualify as a lawful one:[61]

(i) Proof (large-scale and grave violations of human rights, similar to those embodied in the Rome Statute of the ICC, committed in a state with the help of the state authorities or because of the inability thereof to control the situation).

(ii) Notice (from a regional international organization to the state concerned, with no success).

(iii) Exhaustion of other available remedies (such as economic sanctions).

(iv) The role of the UN (is also seen as a remedy which should be exhausted on an emergency basis by the regional organization prior to the use of force. It is considered to be done if neither the Security Council nor the General Assembly take steps to counter the crimes).

(v) Regional action (fulfilling the following requirements: warning in advance; consent of the intervening states to the jurisdiction of the ICJ—and, once

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60 It should be added that on 6 August 1999 Kofi A. Annan, Secretary-General of the United Nations, issued a Bulletin entitled *Observance by the United Nations Forces of International Humanitarian Law* applicable to "United Nations forces conducting operations under United Nations command and control" (UN Document ST/SGB/1999/13, Preamble). The rules contained in this Bulletin provide for a strict observance of international humanitarian law by UN forces when engaged in an armed conflict (i.e. both in enforcement actions and in peace-keeping operations). Thus, after the entry into force (12 August 1999) of this instrument all UN forces—naturally including those empowered to handle humanitarian crises—have to carry out their activities in accordance with it.

61 See CHARNEY, J. I.: "Anticipatory Humanitarian Intervention in Kosovo." *AJIL*, Vol. 93. No. 4 (October 1999), 838–839. Charney is not the only one to refuse the doctrine of humanitarian intervention. Further authorities of the so-called non-interventionist school have been: Halleck, Angelins, Werdenhagen, Kant, Despagnet, Mamiani, Schachter, Sunga, Chomsky, etc. Furthermore, the ICJ itself has been passionately opposing any forms of intervention as it is enshrined, for example, in the judgements in the Corfu Channel Case (1949) or in the Nicaragua Case (1986).

established, to the ICC's jurisdiction, as well—to settle disputes rising from the action; appropriate purpose and means; withdrawal once the goals are achieved).

It is noteworthy that Charney used the phrase "emergency basis" when writing about the role of the UN. Was he referring to an emergency session or an emergency special session, in accordance with the above discussed Resolution "Uniting for Peace" of the UN General Assembly? Since he did not give any further details, the question cannot be answered in the light of his writing. He, by the way, approached the doctrine of humanitarian intervention with disfavour. "As now conceived—he wrote—the so-called doctrine of humanitarian intervention can lead to an escalation of international violence, discord and disorder, and diminish protections of human rights worldwide."[62]

Ruth Wedgewood (Yale Law School) was of a radically different opinion: "The war over Kosovo may mark an end of Security Council classicism... It may also mark the emergence of a limited and conditional right of humanitarian intervention permitting the use of force to protect the lives of a threatened population when the decision is taken by what most of the world recognize as a responsible multilateral organization and the Security Council does not oppose the action."[63]

Finally, standing somewhere between two opposite extremes, the above-mentioned Richard A. Falk's viewpoint that he elaborated in connection with the Kosovo crisis, should be introduced briefly. It is based upon the theory of "double condemnation" and says that "genocidal behaviour cannot be shielded by claims of sovereignty, but neither can these claims be overridden by unauthorized uses of force delivered in an excessive and inappropriate manner".[64] He also expressed that if the international community drew the proper conclusions from the lessons of the "badly flawed" Kosovo intervention, then the view that war was a last resort could be strengthened and the humanitarian character of humanitarian intervention could be preserved and maintained.

In order to summarize the second period of humanitarian intervention and in the light of the second and third chapters of this study, it can be stated that an explicit authorization for intervention in the interest of humanity cannot be

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62 *Ibid.*, 835.

63 WEDGEWOOD, R.: "NATO's Campaign in Yugoslavia." *AJIL*, Vol. 93. No. 4 (October 1999), 828.

64 FALK, R. A.: "Kosovo, World Order and the Future of International Law." *AJIL*, Vol. 93. No. 4 (October 1999), 848.

derived from international law, however, the consensus as well as the *opinio iuris* are missing in order to declare a comprehensive prohibition.[65]

Concluding Remarks

The aim of the present study was to discuss the various theories on humanitarian intervention that have risen throughout the history of international law. Humanitarian intervention is frequently talked about, but much less is known about it. No wonder. The relevant features, requirements, conditions, concerns and uncertainties could be discussed and debated without end. Just to mention a few of the shocking characteristics of humanitarian intervention: It is undoubtedly a sub-category of intervention, however seems to have been—and might as well become once again—an exception to the principle of non-intervention. It is not only a phenomenon within the domain of law, but also of serious moral concern.

With a bit of cynicism, one can state that the international community has to and has had to overcome only two problems with respect to this category: definition and application. Furthermore, any consensus reached in these two fields would start a chain reaction in the re-evaluation of fundamental principles of contemporary international law (i.e. respect for human rights *versus* the principle of sovereignty and non-intervention).

Nevertheless, I believe that in the future these problems can and have to be solved and—by a careful legal regulation—the relevant concerns can be dispelled. Of course this depends on the direction international law, and more specifically human rights law, will take. A fast and effective human rights protection mechanism to combat grave and massive violations of human rights is definitely badly needed. Once established, it would also bring along the advantage of being in possession of a powerful deterrent *vis-á-vis* governments about to commit outrageous violations of human rights. Prevention is always better than a cure.

Large obstacles stand in the way of desired changes, though, such as the clarification of the legal character of human rights as well as their relation to

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65 Cf. NGUYEN, Q. D.—DAILLIER, P.—PELLET, A.: *Droit International Public*. 4e Édition. Paris: Librairie Générale de Droit et de Jurisprudence, 1992. 872. In the French literature see also Ch. ROUSSEAU: *Droit International Public*. Tome IV. Les Relations Internationales. Paris: Sirey, 1980. 49. For one of the most recent publications on this issue see the brilliant report entitled "Humanitarian Intervention. Legal and Political Aspects" prepared by the Danish Institute of International Affairs in 1999.

other, "traditional" *erga omnes* norms of international law; the "erosion" of the UN Charter and the reform of the organization, just to mention a few.[66]

Considering all factors relating to the "international law enforcement mechanism of human rights", it is quite understandable why many tend to share a pessimistic view as to whether humanitarian intervention will ever be justified, for instance as a third exception to the prohibiton of use of force. For the time being, only the following cautious, but less legalistic answer can be given: "perhaps".

66 As Louis Henkin (Columbia University School of Law) put it: "Kosovo demonstrates yet again a compelling need to address deficiencies in the law and practice of the UN Charter. (...) The NATO action in Kosovo... may reflect a step taken towards a change in the law... This may be a desirable change, perhaps even an inevitable change. (...) That might be the lesson of Kosovo." HENKIN, L.: "Kosovo and the Law of 'Humanitarian Intervention'." *AJIL*, Vol. 93. No. 4 (October 1999), 828. See also ANNAN, K. A.: *"We the Peoples": The Role of the United Nations in the 21st Century.* Report of the Secretary-General of the United Nations, 2000. As for the "erosion" of the UN Charter see BLUM, Y. Z.: *Eroding the UN Charter.* Dordrecht–Boston–London: Martinus Nijhoff Publishers, 1993.

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KALEIDOSCOPE

Protection and Preservation of the Marine Environment in the Republic of Croatia

I. Introduction

Since the moment of his coming into existence man has influenced the formation of his natural environment whose original state has been completely transformed in the course of thousands of years. The ecological drama of civilisation, particularly prominent in the marine environment, requires the introduction of concrete ecological standards. Although environmental law is by its nature interdisciplinary, legal regulation fulfils one of the most important tasks in the achievement of this aim.[1] The international law of protection and preservation of the marine environment is a branch of international law which has only recently begun to be developed systematically.[2] The legal regulation of protecting the marine environment from vessels-source pollution (vessels being the main source of pollution) contains elaborate safety standards of preventive significance as well as a corresponding civil law component. In this field, the international system of regulations is not uniform because it depends on the type of pollution, namely

1 OMEJEC, J.: Uvodna i osnovna pitanja prava okoliša (Introductory and basic questions of environmental law). In: Olivera Lončarić-Horvat et al. (ed.): *Osnove prava okoliša* (The Fundamentals of Environmental Law). Zagreb, 1997, 15–20.

2 SERŠIĆ, M.: *Okoliš s međunarosnog stajališta* (Environment from the viewpoint of international law). In: LONČARIĆ-HORVAT: *op. cit.*, 193 ff.

whether it is pollution by the discharge of oil, pollution caused by the maritime carriage of hazardous and noxious substances or pollution damage by nuclear materials.[3]

II. International Regulations Relating to Marine Pollution from Vessels

1. Pollution by oil

a) *International Convention on Civil Liability for Oil Pollution Damage* (Brussels, 1969). This Convention establishes a system of the shipowner's strict liability for damage by the discharge of oil carried as bulk cargo.[4] The provisions of this Convention were amended by the Protocol of 1976 (which introduced a new Unit of Account—the Special Drawing Right—instead of the gold franc)[5] and the Protocol of 1984 (which expanded the application of the Convention and increased liability amounts).[6] The Protocol of 1992 adopted the entire text of the 1984 Protocol except its term of entering into force.[7]

b) *International Convention on Civil Liability for Oil Pollution Damage* (1992). According to Article 11 of the 1992 Protocol, the text of this Protocol and the text of the 1969 Convention are to be interpreted as a single instrument under this title.[8]

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3 HLAČA, V.–STANKOVIĆ, G.: *Pravo zaštite morskog okoliša* (Law of protection of the marine environment). Rijeka, 1997, 9.

4 *Službeni list SFRJ–Međunarodni ugovori* (Official Gazette of SFRY—International Agreements), No. 2/77. The Republic of Croatia ratified this Convention [*Narodne novine–Međunarodni ugovori* (Official Gazette of the Republic of Croatia—International Agreements), No. 1/92], but subsequently called it off, so that it has not been effective since 30 July 1999 [*Narodne novine–Međunarodni ugovori* (Official Gazette of the Republic of Croatia—International Agreements), No. 6/98].

5 The Republic of Croatia did not ratify this Protocol which came into force in April 1981.

6 This Protocol did not enter into force.

7 The Protocol of 1992 entered into force on 30 May 1996. As to its significance, see FILIPOVIĆ, V.: Hrvatska bi trebala što prije ratificirati nove Protokole 1992. o naknadi štete uzrokovane onečišćenjem naftom (Croatia should as soon as possible ratify the new Protocols of 1992 relating to oil pollution damage), *Uporedno pomorsko pravo* (Comparative Maritime Law), Zagreb, No. 1–4, 1993, 33–41.

8 The Republic of Croatia ratified the Protocol of 1992 on 12 January 1998 [*Narodne novine–Međunarodni ugovori* (Official Gazette of the Republic of Croatia—International Agreements), No. 2/97]. It became effective on 12 January 1999 [*Narodne novine–Međunarodni ugovori* (Official Gazette of the Republic of Croatia—International Agreements), No. 3/99]. For the text of the Convention in both English and Croatian, see *Glasnik*, Zagreb, No. 2, 1999, 7–37.

c) *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (Brussels, 1971). This Convention supplements the previous Convention of 1969 in such a way that the injured persons can obtain full compensation where this was not possible according to the text of 1969, and that shipowners as perpetrators of damage are released from the additional financial burden imposed under the 1969 Convention.[9] Later on, the provisions of this Convention were also modified by the Protocols of 1976,[10] 1984,[11] and 1992.[12]

d) *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (1992). According to Article 27 of the 1992 Protocol to amend the Convention of 1971, both texts are to be interpreted together as a unique instrument under the title *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (1992).[13]

e) *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* (Brussels. 1969). This Convention entitles signatory States to undertake necessary measures on the high seas in order to prevent, control and reduce serious or unavoidable hazards to their coast or coast-related interests in cases of oil pollution caused by maritime casualties or by activities connected with such accidents. Since the Convention refers only to oil (crude oil, fuel oil, diesel oil and lubricating oil), the Protocol of 1973 extends State powers to cases of marine pollution by substances other than oil that are noxious to human health and life on the sea.[14]

f) *International Convention for the Prevention of Pollution from Ships*, 1973, as amended by the Protocol of 1978 (*MARPOL Convention 1973/1978*). The Protocol of 1978 contains the provisions of the Convention of 1973 with amendments so that the coming into force of the Protocol in 1983 meant the coming into force of an amended Convention. As a single unified international instrument, it is so far the most thorough international treaty on the prevention of marine pollution by oil. Its aim is to prevent any (intentional or accidental)

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9 See note 4.

10 The Republic of Croatia did not ratify this Protocol which came into force in November 1994.

11 See note 6.

12 See note 7.

13 As to its becoming effective in the Republic of Croatia, see note 8.

14 *Službeni list SFRJ–Međunarodni ugovori* (Official Gazette of SFRY—International Agreements), No. 2/77. The Republic of Croatia adopted this Convention [*Narodne novine–Međunarodni ugovori* (Official Gazette of the Republic of Croatia–International Agreements), No. 1/92].

pollution of the marine environment from ships by any substances harmful to people and to the living and mineral resources of the sea. Therefore, the pollution from vessels includes dumping, discharge, emptying, spilling and leakage.[15]

g) *Convention on the Protection of the Mediterranean Sea from Pollution* (Barcelona, 1976). This Convention provides that it is a general obligation of all States, parties to the Convention, to undertake all appropriate measures to prevent and control pollution in the area of the Mediterranean Sea, namely pollution by the dumping of waste and other substances or by discharge from vessels, pollution caused by activities in the submarine areas (sea-bed and subsoil), and pollution from land-based sources. The 1976 Protocol to the Convention further specifies the agreed-upon measures, procedures and standards to ensure the proper application of the Convention.[16]

h) *UN Convention on the Law of the Sea* (Montego Bay, 1982). This Convention is a unified system of regulations relating to the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline. An important novelty is the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their interests from pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.[17]

i) *International Convention on Salvage* (London, 1989). Better ecological protection of the sea and greater stimulation of salvors are the main features of this Convention. The duty of care in preventing or reducing damage to the environment pertains to both the salvor and the salvaged. The criteria for determining salvage remuneration include a new element (the salvor's skill and efforts at preventing or reducing damage to the environment), while the basic stimulus is a special award for protecting the environment.[18]

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15 *Službeni list SFRJ–Međunarodni ugovori* (Official Gazette of SFRY–International Agreements), No. 2/85. The Republic of Croatia adopted this Convention [*Narodne novine–Međunarodni ugovori* (Official Gazette of the Republic of Croatia–International Agreements), No. 1/92].

16 *Službeni list SFRJ–Međunarodni ugovori* (Official Gazette of SFRY–International Agreements), No. 12/77. The Republic of Croatia adopted this Convention [*Narodne novine–Međunarodni ugovori* (Official Gazette of the Republic of Croatia–International Agreements), No. 12/93].

17 The Republic of Croatia ratified this Convention [*Narodne novine–Međunarodni ugovori* (Official Gazette of the Republic of Croatia–International Agreements), No. 1/92].

18 This Convention (which came into force on 14 July 1996) was ratified by the Republic of Croatia [*Narodne novine–Međunarodni ugovori* (Official Gazette of the Republic of Croatia–International Agreements), No. 9/98]. For its novelties see GRABOVAC, I.: Zaštita morskog okoliša

j) International Convention on Alertness, Action and Collaboration in Cases of Marine Pollution by Oil (London, 1990). The Convention mentioned under g) obliged the Republic of Croatia to ratify the Convention of 1996. It is specific in nature and its object is to prevent and control marine pollution.[19]

2. Pollution by hazardous and noxious substances

a) International Convention for the Safety of Life at Sea—SOLAS Convention (London, 1974). The eight provisions of Chapter VII are the basic regulation relating to the carriage of dangerous and harmful substances (classification, packing, marking, stowage). Since its enforcement the Convention has been amended several times (1978, 1981, 1983, 1986).[20]

b) Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter (London, 1972). This is the first general international treaty on the prevention of dumping of waste in the sea. It forbids the dumping of waste that is defined as pollutant. Waste is categorised and listed, and a specific treatment is provided for each list. Moreover, the dumping of any waste is to be under strict control.[21]

c) MARPOL Convention 1973/1978 is the basic instrument for controlling pollution by hazardous and noxious substances which are classified into liquid substances in bulk, harmful substances in packages, faecal discharge and waste from ships (cf. *supra* II 1 f).

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i odredbe nove Konvencije o spašavanju (Protection of the marine environment and provisions of the new Convention on Salvage), *Uporedno pomorsko pravo* (Comparative Maritime Law). Zagreb, No. 1–2, 1990, 13–22.

19 The Republic of Croatia ratified this Convention [*Narodne novine—Međunarodni ugovori* (Official Gazette of the Republic of Croatia—International Agreements), No. 2/97].

20 *Službeni list SFRJ—Međunarodni ugovori* (Official Gazette of SFRY—International Agreements), No. 2/81. The Republic of Croatia adopted this Convention [*Narodne novine—Međunarodni ugovori* (Official Gazette of the Republic of Croatia—International Agreements), No. 1/92].

21 *Službeni list SFRJ—Međunarodni ugovori* (Official Gazette of SFRY—International Agreements), No. 13/77. The Republic of Croatia adopted this Convention [*Narodne novine—Međunarodni ugovori* (Official Gazette of the Republic of Croatia—International Agreements), No. 3/95]. See GRABOVAC, I.—BOLANČA, D.: Zaštita morskog okoliša u teritorijalnom moru uz obalu otoka Palagruže u slučaju pomorske nezgode (Protection of the marine environment in the territorial sea along the Island of Palagruža in cases of incidents of navigation), *Zbornik radova "Palagruža—jadranski dragulj"* (Collected Papers—"Palagruža—an Adriatic Jewel"). Split—Kaštela, 1996, 160.

d) International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (London, 1996) introduces the shipowner's causal liability for loss of life or bodily injuries inflicted by hazardous and noxious substances on board or off board a ship carrying these substances, and for any loss of or damage to property not on board a ship carrying substances that have caused the loss or damage in question.[22]

e) In cases of this type of pollution, *mutatis mutandis*, the international Conventions mentioned *supra*, II 1 g, h, i, and j, are applicable.

3. Pollution by nuclear substances

a) Convention on the Liability of Operators of Nuclear Ships (Brussels, 1962). The operator of a nuclear ship has strict liability for nuclear damage to people or things (i.e. peculiar damage brought about under the circumstances of typical hazards involving processes of fission or ionisation of radioactive materials).[23]

b) Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 1960). Under this Convention the operator of nuclear installations is exclusively liable for any damage on the basis of stricter causal liability provisions, but under certain conditions liability can be transferred to the specialised carrier (thus to the ship operator as well).[24]

c) Convention on Civil Liability for Nuclear Damage (Vienna, 1963) contains the basic principles of the Convention mentioned under II 3 b.[25]

d) International Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials (Brussels, 1971). According to this Convention, where ship operators are liable for nuclear pollution damage under international or domestic law, they may be exempted from such liability if the operator of nuclear installations is liable for that damage under the Paris or Vienna

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22 This Convention has not entered into force yet, so the Republic of Croatia has not ratified it.

23 The Republic of Croatia has not ratified this Convention.

24 The Republic of Croatia has not ratified this Convention.

25 *Službeni list SFRJ—Međunarodni ugovori* (Official Gazette of SFRY—International Agreements), No. 5/77. The Republic of Croatia adopted this Convention [*Narodne novine—Međunarodni ugovori* (Official Gazette of the Republic of Croatia—International Agreements), No. 12/93].

Conventions (*supra* II 3 b and c) or under national legislation that has adopted the provisions of these Conventions.[26]

III. Croatian Regulations Relating to Marine Pollution from Vessels

1. Constitution of the Republic of Croatia[27]

The Constitution of the Republic of Croatia is the basic source of environmental law since it deals with this matter in a number of its provisions and lends special ecological significance to the sea (Art. 52).[28]

2. Conservation of the Environment Act[29]

As the basic Act in the field of protection and preservation of the environment, this law formalises constitutional principles. *Inter alia*, it defines the environment as the natural environment which includes the sea (Art. 5, par. 1, 1), introduces the principle of paying expenses incurred by pollution (Art. 16) and regulates the question of civil liability for pollution damage (Art. 50). Namely, under the general rules of the Croatian law of obligations (which covers both contract and tort law), the responsible person (the one that caused pollution or, by some unlawful or incorrect action, allowed it to take place) is liable for pollution damage.[30]

3. Maritime Code[31]

With respect to marine pollution, this Code, as a modern codified law, is based on the relevant international conventional solutions. With respect to pollution by oil that is carried as cargo (Part IX, Ch. V 4, Art. 839–849), it adopts the text of the Convention of 1969 and the Protocols 1976 and 1984 (*supra* II 1 a and c). However, since January 1999, the Republic of Croatia has become involved in a

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26 The Republic of Croatia has not ratified this Convention.

27 *Narodne novine* (Official Gazette of the Republic of Croatia), No. 56/90.

28 OMEJEC: *op. cit.*, 45–53.

29 *Narodne novine* (Official Gazette of the Republic of Croatia), No. 82/94.

30 KLARIĆ, P.: Građanskopravna zaštita okoliša prema hrvatskom pravu (Conservation of the environment under Croatian civil law), *Zbornik radova 'Pravne možnosti varovanja skupinskih interesov za zdravo okolje'* (Legal Protection of Collective Interests Relating to the Healthy Environment—Collected Papers). University of Maribor, Faculty of Law, 1996, 74–76; GLIHA, I.—JOSIPOVIĆ, T.: Zaštita okoliša s građanskopravnog stajališta (Conservation of the environment from the civil law viewpoint), in: LONČARIĆ-HORVAT: *op. cit.*, 15–20.

31 *Narodne novine* (Official Gazette of the Republic of Croatia), No. 17/94, 74/94, and 43/96.

new, modernised regime of liability (*supra* II 1 b and d).[32] Part IX, Ch. VI, Articles 850–866 adopt the *International Convention on the Liability of Operators of Nuclear Ships* (*supra* II 3 a). The *Maritime Code* (Part IX, Ch. II, Art. 774–800) also follows new solutions in the field of salvage (*supra* II 1 i). It also adopts many solutions from the *Convention on the Law of the Sea,* 1982 (*supra* II 1 f).

4. Seaports Act[33]

This Act regulates a specific case of liability for damage to the environment. Namely, it provides that the port authority or the company that has a concession for using a port for specific purposes is liable for marine pollution in the port or for dumping waste that settles on the sea bottom in the port (Art. 51, par. 1).

5. Carriage of Dangerous Substances Act[34]

This Act does not deal directly with the question of civil liability for damage caused by the carriage of hazardous substances, but prescribes compulsory third-party insurance against damage incurred by such carriage (Art. 9).

6. Liability for Nuclear Damage Act[35]

This Act is in accordance with the Vienna Convention of 1963 (*supra* II 3 c). It provides stricter rules on the absolute liability of the operator (the person that has obtained a permission from a competent state body to build or use nuclear installations), while in some cases liability can be transferred to specialised ship operators (Art. 2, 5 and 7).[36]

IV. Conclusion

This paper is a short survey of international regulations governing the prevention of marine pollution and civil liability as an efficient mechanism of compensation for pollution damage. The most important international Conventions relating to

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32 ĆORIĆ, D.: Međunarodni sustav odgovornosti za štetu zbog onečišćenja uljem iz 1992. (International system of liability for oil pollution damage), *Uporedno pomorsko pravo* (Comparative Maritime Law). Zagreb, No. 1–2, 1997, 53–55.

33 *Narodne novine* (Official Gazette of the Republic of Croatia), No. 108/95.

34 *Narodne novine* (Official Gazette of the Republic of Croatia), No. 97/93.

35 *Narodne novine* (Official Gazette of the Republic of Croatia), No. 143/98.

36 As to the essential features of this Act, see GRABOVAC, I.: Odgovornost za nuklearnu štetu u Republici Hrvatskoj (Liability for nuclear damage in the Republic of Croatia), *Zbornik radova* (Collected Papers), Law Faculty of Mostar, No. XII, 1999, 11–17.

pollution by oil, by hazardous and noxious substances and by nuclear materials are described. It is argued that the Republic of Croatia should consistently ratify and apply these Conventions. In its maritime legislation, our country has always to a large extent recognised provisions and principles of different international Conventions and has also followed modern unified solutions in the field of marine pollution. Croatian legislation contains special laws for some types of pollution (*Maritime Code*, *Carriage of Dangerous Substances Act*, *Liability for Nuclear Damage Act*). However, where there are no specific regulations, in questions of civil liability for marine pollution, general regulations (such as the *Conservation of the Environment Act*) are applicable. In the future, the Republic of Croatia should continue to apply the existing positive law, ratify new international Conventions relating to the protection of the marine environment from pollution (e.g., *London Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea*, 1996), and make an effort to harmonise domestic regulations with relevant legal solutions from international sources.

Dragan Bolanča

PRINTED IN HUNGARY
PXP Ltd., Budapest


1216-2574(2000)41:1/2;1-A

Vol. 41. Nos 3–4. 2000

HU ISSN 1216-2574

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Editor-in-Chief *Vilmos Peschka*

Akadémiai Kiadó
Budapest

Kluwer Academic Publishers
Dordrecht / Boston / London

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

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KLUWER ACADEMIC PUBLISHERS
P. O. Box 17, 3300 Dordrecht,
The Netherlands
Fax: (31) 78 639 2254
http://www.wkap.nl

Publication programme, 2000: Volume 41 (in 4 issues).

Subscription price: NLG 495.00 (USD 236.00) per annum including postage & handling.

Acta Juridica Hungarica is abstracted/indexed in Information Technology and the Law, International Political Science Abstracts, Political Science Abstracts.

AJur 41 (2000) 3–4

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

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ACTA JURIDICA HUNGARICA

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1216-2574 / 2000 / USD 5.00

STUDIES

András SAJÓ

The Limited Impact of Communist and Democratic Socio-Legal Experiences

One of the Cold War's more lasting effects is that the East-West divide continues to pervade the mentality of social scientists. Communism's enduring effects may be of considerable explanatory value for political scientists (transitology *requiescat in pacem*), but it is quite disappointing to see them coming from sociologists. The transition to democracy seems to easily lend itself to East-West continuum explanations where the communist past creates a post-totalitarian mental state which creates and explains differences between these two parts of the world. This article intends to show that those differences exist primarily in the minds of legal sociologists (among many others who deal with the former *Ostblock*). To do so, I will use data and interpretation of a comparative legal socialization survey completed in 1995.[1] The first summary of this survey, "Legal Socialization Effects on Democratization," was published by Ellen S. Cohn and Susan O. White in the *International Social Science Journal* 152 (June 1997) (hereinafter Cohn and White). In their article, Cohn and White state that the survey was a collaborative project of a number of American scholars and

1 Funding for the survey was provided by (US) National Science Foundation (SE 13237 and SIR 11403). Additional support for planning conferences was granted by the French CNRS and by Central European University, Budapest.

Europeans (including the present author) who were their "collaborators." Yet the Europeans had no control whatsoever on the questionnaire's final wording which originally covered Bulgaria, Hungary, Poland, France, Spain, and the United States, and was partially repeated in Russia.

It would require another article to discuss the psychological and political (as well as economic) issues which necessitate keeping the Eastern European countries in a zoo of inferior (but developing) animals. More specifically, in line with transitology jargon, Cohn and White found "particularly striking" that people who "took to the revolutionary streets ... still have the capacity to believe that power can be limited." As a matter of fact, the streets in 1989 in Eastern Europe were not revolutionary just not very elegant or well lit. Following again transitology jargon, Cohn and White developed a hypothesis that democratization in Eastern Europe is a process of *rapprochement* to Western legal values. This thesis, they believed, was at least partly corroborated by the survey's data. Legal attitudes come from democratization, consequently Eastern Europeans will score lower on value scales which indicate ripe democracy. To me, it is not only the paternalism evident in this statement that is troubling but the fact that the contempt behind it results in highly problematic data handling and, in particular, in declaring statistically insignificant differences as signs of developments in the happy democratization scenario. According to this thesis, the pro-liberty, rule of law, "intellectual openness" values are situated on a continuum where one end is Bulgaria (or Russia) and the other is the US. As the data will show, the empirical data regarding not only Eastern Europe but Europe in general cannot be shown to illustrate democratization. Legal consciousness is not in linear correlation with social and political democratization.

The attitude toward law and the use of law in Eastern Europe cannot be conceived as a process of getting rid of the imposed authoritarian straightjacket of communist concepts, arbitrariness, and dependency. Both during and after communism, legal attitudes were shaped by learned patterns of anti-communism and traditional inherited values and customs which helped people live under communism and in the complicated conditions which emerged after 1989. The various East European populations are quite different, and these differences cannot be explained by the citizens being better or worse students in the great school of democracy. Indeed, if one looks at the West in regard to the rule of law and attitudes toward law, differences among attitudes are enormous because of social and cultural differences among the various nations. Yet this is not to say that, in certain regards, the democratization thesis does not work with the rule of law, liberalism, and dogmatism. Moreover, a population's perception of the authorities also illustrates that the actual components of the rule of law differ between the East

and West. More Americans and French believe that police take their complaints seriously than do those in Eastern Europe. Russians, in particular, have very negative attitudes regarding the police.[2]

This article will deal primarily with Hungarian legal attitudes as a case study of supposed changes in attitudes. My hypothesis is that in post-communism as in the West – long term social and cultural factors make the difference in attitudes toward law. These differences cannot be placed on an easily understood continuum where the American affirmation of democracy is on the spectrum's positive end. There may be a divide between Europe and the US, but there is much less of a divide between democratizing and democratized countries. Sociologists, contrary to politicians, should always remember that politics and ideology can shape only to a limited extent what is created by cultural patterns and historical conditions. A society, as the survey data illustrates, is not simply a function of the legal system. Even where the legal system has the features of a democracy, people may have good (i.e. social) reasons to disobey—at least in some instances – the law. (And, likewise, the fact that a high percentage of respondents answer questions on obedience to law in a positive way reveals little about that society's level of normalized unlawfulness.) It is therefore not surprising that "clear country differences ... are not always related to (Cohn and White's) democratization scale." Likewise individualism, interest in rights, and political freedoms can be explained outside the democratization straightjacket.

Most of the differences in legal attitudes in the various countries (which are probably attributed to culture and different levels of democratization) disappear if one compares those with comparable levels of education. Indeed, one of the great differences among the national samples is that the level of education differs according to that country's previous regime. (Correspondingly, age and education – and the two are interrelated – easily explain different attitudes whereas religion and gender fail to explain differences.) The difference among attitudes is further increased by the survey method: in the US, a telephone interview was conducted. It follows that the lowest social and education groups are under-

2 The difference in regard to encounters with the police is not necessarily a function of police behaviour (rule of law and service oriented, non-authoritarian role perception) but that of the size of the middle class. Police tend to have a different attitude toward middle class. If the middle class is bigger the likelihood of positive personal encounter is higher. France and the US where the two typical middle class countries in the sample.

represented.[3] Once education is controlled, many of the country (and level of democratization) differences disappear. According to Cohn and White's Table 1, Bulgarians score the lowest in lawfulness, rights, individualism, and liberty (sometimes in the company of other East European respondents). Bulgarians with a university education score 20 percent higher on the dogmatism scale than Americans. But once controlled for education, the other nations are not significantly more dogmatic than Americans. If one looks at those with the lowest education level, the myth of Americans being less dogmatic simply does not work. Here the Spanish score significantly lower on the dogmatism scale, while for example, there is no difference among Americans, French, and Hungarians.[4]

Similarly, the score on the liberty scale depends on the education level. French with the highest level of education are the most pro-liberty oriented. In the case of attitudes toward liberty, the East-West contrast is applicable, although, with the exception of Bulgaria, education considerably increases liberty's importance. What is perhaps more surprising is that, even with the enormous difference in the intensity of political oppression under communism between Bulgaria, Hungary, and Poland, attitudes toward political liberty among citizens of those countries with a low level of education do not differ significantly. Perhaps oppression of the lower classes was the same everywhere.

In principle, the affirmation of liberty and political rights are interrelated. Unfortunately Cohn and White use a single indicator for rights consciousness.[5] In this indicator, first, second, and third generation rights are included. This is surprising not only from the perspective of legal theory, but it is also methodologically incorrect as the factor analysis divided the

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3 One of the problems the European "collaborators" had was that the education data was practically incomparable. One could only compare those with university education with the rest, and, with less certainty, the lowest education groups (below high school but often with vocational education) with the rest of the respondents.

4 Cohn and White found that Bulgaria is the most dogmatic, followed by Poland, Hungary, adn France. Spain and the US were the least dogmatic with no significant difference. Cohn and White the above are based on Scheffe *post hoc* tests.

5 It is surprising how little respect is shown to elementary methodology in the quest for support of the democratization thesis. Gibson and Gouws use a single question, or two at best, to indicate a country's attitude towards the rule of law. Where two answers are contradictory, this is disregarded as is the case in Poland. GIBSON, J. GOUWS, A.: Support for the rule of law in the Emerging South African Democracy. *International Social Science Journal* 1997 June (152) 181. Table 2.

rights items into two factors (in some of the countries into three). Additionally, in the different countries, the composition of the factors seems to differ at times. Environmental rights and the right to settle in the given country scored above .5 on a third factor in Russia and the US but did not result in a separate factor in the other countries. Abortion rights neatly separates from political rights. What makes comparison even more difficult is that, in some of the cases, social and political rights figure very high in the same factor (Spain) while, in Hungary, for example, notwithstanding their interrelations, the relation is not so close.

A second set of questions was used to determine legalism (readiness to observe law). The factor analysis resulted in two factors. This indicates that an observance of law based on social consensus differs in the public mind from the instrumentalist attitude toward law (law is followed only to the extent that it is reasonable in view of consequences).[6] Questions dealing with breaking the law (FACLEGS2) tend to build a separate factor from items regarding law observance (FACLEGSO).

In terms of law observance (FACLEGSO), Americans score the highest, and there are considerable country differences.

----- ONEWAY -----

Variable FACLEGSO REGR factor score 1 for analysis 1
By Variable COUNTRY COUNTRY

Multiple Range Tests: Scheffe test with significance level .05

The difference between two means is significant if
MEAN(J)-MEAN(I) >= .6475
* RANGE * SQRT(1/N(I) + 1/N(J))
with the following value(s) for RANGE: 5.02

(*) Indicates significant differences which are shown in the lower triangle

6 In some questions the respondents had to express agreement with statements regarding the fairness of law. The whole concept of fairness is of limited use once translated into Hungarian where the concept has limited applicability and the primary meaning of the word is different. This is probably true of other languages and cultures.

Mean	COUNTRY*						
	1	4	5	2	6	3	7
-.3631 Grp 1							
-.3527 Grp 4							
-.2054 Grp 5	*						
-.0951 Grp 2	*	*					
.1011 Grp 6	*	*	*	*			
.2650 Grp 3	*	*	*	*			
.8496 Grp 7	*	*	*	*	*	*	*

(*) Here and elsewhere: Group (Grp) = Country

1 = Bulgaria
2 = France
3 = Hungary
4 = Poland
5 = Russia
6 = Spain
7 = United States

If the sample is controlled for education, there is no difference when one compares Americans with a university degree with Hungarians with a university degree.

Dependent variable FACLEGSO by COUNTRY
(University degree holders)

	Mean	Cases
Bulgaria	.14	89
France	.42	172
Hungary	.98	79
Poland	.46	55
Spain	.44	115
United States	1.01	283

Based on the second factor (breaking the law), a completely different structure emerges with Spain and Poland representing the two extreme points: Spaniards have little difficulty with breaking the law while Poles are particularly rigid about observance of the law.

Variable FACLEGS2 REGR factor score 2 for analysis 1
By Variable COUNTRY COUNTRY

Multiple Range Tests: Scheffe test with significance level .05

The difference between two means is significant if
MEAN(J)-MEAN(I) >= .6572
* RANGE * SQRT(1/N(I) + 1/N(J))
with the following value(s) for RANGE: 5.02

(*) Indicates significant differences which are shown in the lower triangle

Mean		COUNTRY						
		6	5	3	7	1	2	4
-.7052	Grp 6							
-.3170	Grp 5	*						
-.0344	Grp 3	*	*					
.1169	Grp 7	*	*					
.1489	Grp 1	*	*	*				
.1853	Grp 2	*	*	*				
.5310	Grp 4	*	*	*	*	*	*	

Based on a cluster analysis, a formalistic respect of law is most common among Americans (40%) and, to a lesser extent, Hungarians (28%). The democratization theory certainly does not explain the high occurrence among Hungarians of such legal formalism—rather, traditional formal respect for authority is a good explanation (although this never made it difficult for Hungarians to disregard the law in practice). French, Bulgarian, and Russian respondents tend to a consensual acceptance of law. One of the emerging clusters indicates that, to many respondents, the law loses its binding force if there is no consensual legitimation. (This was the most numerous cluster at –21.5% and the most common in France at 30%.) The relative majority of Poles (38%) accept all reasons for law observance. (Law is followed to avoid punishment and for consensual reasons; moreover there is no justification for breaking it.) The largest group among the Spaniards (34%) shows a cluster view which is characterized by a different type of consensualism. Here breaking the law is a matter of consensus, but, generally, respondents tend to accept most of the positions regarding law observance with reservations.

Considering political rights alone, the East-West difference among the groups with the highest level of education disappears, except for Spain and the US. The table below (table 1.) illustrates the importance of political rights for the total population.

COUNTRY COUNTRY by RIGHT1 HOW IMPORTANT-FREEDOM OF POLITICAL VIEWS						
	RIGHT1					
	Row Pct NOT VERY IMPORTANT				VERY IMPORTANT	
COUNTRY	1	2	3	4	5	%
BULGARIA	3.8	4.8	13.1	21.8	56.5	19.7
FRANCE	4.3	3.7	10.6	18.1	63.3	13.1
HUNGARY	9.9	7.2	20.9	17.3	44.6	13.4
POLAND	4.4	4.6	11.3	20.1	59.6	14.0
RUSSIA	12.7	10.5	20.8	19.5	36.6	12.7
SPAIN	1.0	.8	4.7	17.5	75.9	13.2
UNITED STATES	2.1	.7	3.6	6.8	86.8	13.9
Column	307	265	702	1015	3507	5796
Total	5.3	4.6	12.1	17.5	60.5	100.0

Table 1.

While different attitudes correspond to the East-West continuum hypothesis (with a Hungarian enigma) for the total population, if one compares only those with the highest level of education, there are no significant differences, except that in this group, Americans and Spaniards score higher than the rest. The differences remain more pronounced regarding the less educated.[7]

As to social (welfare) rights (using a factor score based indicator), there are significant differences between Hungarians with a low level of education (strong supporters of these rights) and comparably uneducated Americans and Spaniards (low support). Once again, among those with a university education, Hungarians and Bulgarians were significantly more supportive of welfare rights than Americans but less supportive than the educated French. Here, again, Americans differ from the rest of the sample. (When further discussing Hungarian views toward welfare rights, it will become clearer that the underlying structures are different even where there are no noticeable differences in attitudes.) Americans differ further because of the importance they attribute to environmental rights.

7 The American implementers of the research kindly provided certain comparable data on Russia, except the data on education. I expect that the above trends apply for Russia as well. Once again, there was a strong correlation between classes attended and age.

The final example illustrating that the East-West democratization continuum is blurred and influenced by culture (where culture functions through education) concerns attitudes toward the rights of marginal, minority, and radical groups. Regarding what Cohn and White call "excluded groups", Spaniards are the most permissive while Americans and Poles figure at the spectrum's other end. Among those with a low level of education, Bulgarians are the least likely to restrict the rights of radical groups. Americans differ from the other Western nations in this matter. Among the better educated, the East-West continuum prevails.

It follows that whenever legal attitudes correspond to the society's level of democratization, this pattern has more to do with education than with political learning and institutional maturity. While education easily explains these differences, one cannot say that there is simply no difference among national cultures (although not necessarily along the lines of the democratization hypothesis.) In the case of dogmatism, the multiple classification analysis adjusted dev'n beta = 0.26. If a classification by countries is added, this increases slightly (beta = 0.31).

National differences are often the function of social stratification; however, this is not a linear influence. In a number of legal consciousness indicators, Americans scored higher regarding rule of law and liberalism because they are better educated. In the case of Bulgaria at least, the national difference contradicts the stereotype "satellite heritage" thesis. The stereotype suggests that countries which had similar experiences under their previous political regimes will score similarly. Bulgarians differ considerably from Hungarians and Poles. This can be partly explained by their very different experiences under communism, but it seems that traditional differences (which, in turn, resulted in differences in communist oppression) are the most important. The high- and low-level education groups react differently in several countries. For example, when it comes to social (welfare) rights, the respective American social strata react in an opposite manner from other nations. In the US, lower classes are less enthusiastic about the right to work. A country's democratic maturity is also not a decisive factor of its legal culture. In a number of indicators, Spain, which has a relatively short democratic history (at least according to Cohn and White's textbook criteria) outperforms the US in liberalism. And France, which, in many regards, seems closer to Eastern Europe than to the US, seems to show a "dual nation pattern": the different education groups seem to have opposite views of dogmatism and their perception of what constitutes an "important social problem" (deviance). Given this divide, it is perhaps less surprising (also taking into account the long standing impact of leftist politics and values going back to the French Revolution) that France is often closer to Eastern Europe than to the other Western countries.

The alternative to the democratic maturity explanation of legal consciousness is a model based on social realities where long term social factors have a greater explanatory power. Knowing Hungary the best among the countries in the project, I will discuss Hungarian legal representations and, in particular, social-welfare expectations in Hungary. The legal representation approach is based on the assumption that the structuring of concepts and attitudes toward law is the function of a logic which does not follow the law. Rather, the legal representations follow the logic of everyday life. Hence, they are often contradictory and inconsistent. For example, a respondent may favor political rights including freedom of expression but would restrict these rights for extremists and radicals. This can be explained by the way social order and normality is construed. Here the respondent is not applying free-speech values but is construing the problem in terms of controlling disorder in society. Of course, to the extent that legal ideology penetrates everyday life, the construction of problems and their solutions might be more legalistic, as is the case in the US.

The Hungarian sample did show some peculiar contradictions. In all of the questions, Hungarians are very pessimistic both as to the national situation and their own situation.

COUNTRY by "COMPARED TO 1994 HOW THE FAMILY LIVES"						
	Row Pct MUCH WORSE					MUCH BETTER
COUNTRY	1	2	3	4	5	Total
BULGARIA	21.0	34.6	33.6	9.4	1.3	20.2
FRANCE	6.7	26.6	53.7	11.1	1.9	12.8
HUNGARY	28.5	41.6	27.2	2.7		13.3
POLAND	18.4	29.0	38.0	12.9	1.6	13.9
RUSSIA	27.3	29.1	30.4	11.4	1.8	13.0
SPAIN	3.4	21.4	64.3	9.9	1.0	13.1
UNITED STATES	2.4	15.3	57.2	21.2	4.0	13.6
Column	929	1687	2517	656	97	5886
Total	15.8	28.7	42.8	11.1	1.6	100.0

Table 2.

COUNTRY by "CHANGE OF THE ECONOMIC SITUATION IN 1994"						
	Row Pct A LOT WORSE					A LOT BETTER
COUNTRY	1	2	3	4	5	Total
BULGARIA	34.1	36.3	21.8	7.4	.3	20.3
FRANCE	15.6	26.2	36.6	19.9	1.6	13.0
HUNGARY	57.8	31.6	8.3	2.3		13.4
POLAND	18.8	28.2	32.1	20.1	.9	13.7
RUSSIA	43.9	27.6	18.1	9.3	1.1	12.8
SPAIN	30.1	32.1	23.6	12.8	1.3	13.2
UNITED STATES	8.8	34.0	34.4	20.6	2.3	13.6
Column	1727	1796	1427	738	59	5747
Total	30.1	31.3	24.8	12.8	1.0	100.0

Table 3.

COUNTRY by "SATISFACTION WITH THE DEMOCRACY"					
	Row Pct NOT AT ALL				VERY SATISFIED
COUNTRY	1	2	3	4	%
BULGARIA	39.5	41.3	18.2	1.0	20.0
FRANCE	21.7	39.0	35.1	4.2	13.4
HUNGARY	34.6	44.5	19.3	1.6	13.6
POLAND	25.9	51.4	20.6	2.2	13.4
RUSSIA	52.2	33.2	14.2	.5	11.8
SPAIN	27.3	37.5	30.7	4.5	13.4
UNITED STATES	12.7	26.4	51.6	9.3	14.4
Column	1687	2159	1487	180	5513
Total	30.6	39.2	27.0	3.3	100.0

Table 4.

In the survey, 90% of Hungarians responded that the economic situation worsened in 1994; only 12% expected improvements. Moreover, 59% believed that their family would be worse off in the preceding year and 73% feared that there would be unemployment in their family. (Hungary's unemployment rate was higher than Russia's - above 11% although those employed at least receive their salary. Spain's unemployment was much higher.) One would expect anxiety (extremism) and, following it, aggression or cynicism toward public institutions, including law. Indeed, Hungarians are not particularly satisfied with democracy. Only about 20% are satisfied although this share is similar to other post-communist countries, irrespective of pessimism. Only in Russia does one find considerably more dissatisfaction or even extreme negation. The general dissatisfaction in Eastern Europe does not explain the variations in law observance. More Poles are satisfied with democracy - perhaps because this was the only communist country were large masses of people fought for democracy. People tend to identify with what they struggled for. Only 21% of Hungarians perceive the situation as better than it was in 1989 (compared to 56% in Bulgaria and 40% in Poland). This is the lowest in the whole sample. As discussed below, in Hungary, the smallest number of people fear political destabilization.

Hungarians' extreme pessimism may not influence considerably their attitudes (although it certainly has an impact on life strategies and the way they perceive authorities and cope with them). The perception of social problems is a major factor influencing legal attitudes.[8] Compared to the total sample, a smaller amount of Hungarians find certain problems important, notwithstanding a high level of personal concern. (Personal concern generally did not result in changes in legal views; personal concern about a possible loss of job in the family did not result in attitudes favoring the restriction of employment opportunities for foreigners.)

Among the important social problems, unemployment was mentioned by 60% of Hungarians compared to 66% of Poles and 89% of French. As mentioned above, more Hungarians feared that a lack of job threatened their family than any other sample.

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8 The American colleague or colleagues responsible for the project used a very unfortunate method to determine social problems. The respondents were asked wether they find a number of social problems important. This is clearly an invitation to acquiescence. It is very difficult to tell which problem is more important and to what extent, and the only basis for comparison is how often one or the other problem was mentioned as "important".

COUNTRY by "HOW IMPORTANT – CORRUPTION"				
	Row Pct			
COUNTRY	NOT IMPORTANT			VERY
BULGARIA	4.9	31.6	63.5	19.6
FRANCE	3.2	32.7	64.1	13.1
HUNGARY	17.0	36.1	46.9	13.0
POLAND	6.6	32.4	61.0	14.0
RUSSIA	12.6	43.2	44.2	12.5
SPAIN	1.3	11.2	87.5	13.6
UNITED STATES	6.6	31.0	62.3	14.2
Column	407	1753	3485	5645
Total	7.2	31.1	61.7	100.0

Table 5.

Corruption is seen as less of a problem in Hungary and Russia than elsewhere. Likewise, favoritism was mentioned as important by 38% of Hungarians and just 32% in Russia.[9] This indicates a process of normalization (it is unclear why such normalization is not taking place in Poland or Bulgaria) while there is alarmism when it comes to new phenomena like crime.[10] (Crime increased considerably after the collapse of communism, and East Europeans are more concerned about it than Americans and Russians although the crime rate in those two countries is probably more of a problem in everyday life.)

The differences become more marked when building clusters. Hungarians are above the average where an increase in crime and environmental issues are perceived as important and unemployment is not a serious problem – 13% in the cluster compared to 7% in the total occurrence. Here, as in some other areas (see *infra*), there are similarities with the US sample.

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9 This can be explained partly by a mistranslation that occurred notwithstanding my insistence on the contrary. The survey takers allowed that favoritism be translated as *protekcio* which means patronage.

10 An alternative explanation for this attitude is that, for large segments of society, corruption is an elite activity and is not important for the masses.

COUNTRY by THREATC COMMUNISTS ARE THREATENING TO OUR LIFE					
COUNTRY	Row Pct NOT AT ALL				EXTREMELY
	1.0	2.0	3.0	4.0	Total
BULGARIA	43.0	24.4	24.0	8.6	17.9
FRANCE	33.5	48.9	13.6	4.0	13.5
HUNGARY	33.8	33.1	24.0	9.1	13.7
POLAND	28.8	38.0	20.1	13.2	14.1
RUSSIA	51.2	33.2	11.2	4.4	13.5
SPAIN	24.4	21.9	29.5	24.2	12.2
UNITED STATES	13.4	33.9	35.1	17.6	15.1
Column	1665	1681	1151	577	5074
Total	32.8	33.1	22.7	11.4	100.0

Table 6.

COUNTRY by FASCISTS ARE THREATENING TO OUR LIFE					
COUNTRY	Row Pct NOT AT ALL				EXTREMELY
	1.0	2.0	3.0	4.0	Total
BULGARIA	24.8	26.0	34.6	14.5	16.4
FRANCE	7.8	24.5	41.6	26.1	13.6
HUNGARY	30.1	34.2	28.2	7.6	13.6
POLAND	7.8	27.4	30.3	34.5	14.1
RUSSIA	3.1	7.4	28.0	61.5	14.6
SPAIN	24.3	16.3	30.6	28.8	12.4
UNITED STATES	10.4	21.4	44.5	23.6	15.3
Column	773	1130	1715	1406	5024
Total	15.4	22.5	34.1	28.0	100.0

Table 7.

The construction of social problems seems unrelated to the problem of political extremism.[11] The perception of a fascist threat and the suggested legal measures to address this threat, for example, do not seem to be related to the components of the legal consciousness. A multiple regression with the legal consciousness components resulted in multiple R=.39 but, in the analysis of variance F, was not significant.

The perception of a fascist threat was often unrelated to a country's actual social problems. Americans and Spaniards scored the highest regarding the fear of a communist threat while the post-communist countries scored low in this respect. In a number of cases, the threat is the result of long term impacts and indoctrination. (Communists in the US and fascists in Russia. Although fascist parties in Russia are considerably strong, fascism is an agreed common enemy probably because of the lasting effects of communist indoctrination and memories of World War Two. Indeed, in Russia, even fascist parties are offended by comparisons to fascism.) The majority of post-communist citizens did not consider the communist threat a reality at a time when popularly elected former communists were ruling all these countries. Moreover, only few Hungarians see a fascist threat.

These threats are not only not related to other social problems (in light of factor analysis), but the threat's impact on the tolerance of dangerous groups varies greatly. In Hungary, where there is generally a low level of perceived threat, the impact is minimal although significant. The sense of a radical menace negatively influences tolerance (expressed in terms of rights restrictions) only slightly (more in the case of communists than in the case of fascists: $r = -.26$ and $r = -0.1$ respectively). In other countries, however, the perception of a threat has a more significant impact on rights restrictions. In Bulgaria, Russia, and Poland, for example, the ban on communists in politics correlates strongly with the perceived threat ($r = -.5$). In France, where fascists are viewed as a threat by many more people, the perceived threat correlates with the restrictions of fascists' rights ($r = -37$) more strongly than with the right to assembly ($r = -.42$) In Spain and the US, the perceived threat diminishes the political acceptance of both communists and fascists ($r > -.3$ and $r > -.38$) but only to a lesser extent the extremists' right of assembly. In these two countries, the threats are closely related (in Spain $r = .76$ and in the US $r = .59$). The other extreme is France

11 Unfortunately, the American colleagues responsible for the administering the questionnaire introduced here a different technique of asking questions. Respondents were asked to choose "how threatening to YOUR COUNTRY'S way of life would you say communists/fascists are?" The lack of relationships might be an artifact of the interview technique.

where there is no significant correlation between the public's perceptions of these two threats.

The position on rights issues seems to be of little influence when it comes to the actual restriction of rights in situations which some may perceive as endangering public order. (The alternative explanation, especially in the case of fascists, did not work. The restriction was not particularly related to the perceived threat.) The democratization theory would suggest that rights consciousness is underdeveloped in Eastern Europe and, therefore, of lower predictive power. It would also suggest that if actual rights restriction is a function of liberalism or anti-dogmatism, Eastern Europeans would score low in these indicators. In regard to banning communists from official positions, none of these grand hypotheses work. Based on a regression analysis, each country has its own explanatory model depending on the different restrictions and groups perceived as threatening and the variables produce varying R squares.

In the case of banning communists from political life, the model works best in the US (R square = .28) and the R square exceeds .18 in all other countries, except in France and Hungary where it is less than .11. Based on Beta, the most significant variable is the perceived threat in all the countries and in regard to all threats and restrictions. Liberalism was significant in Spain, Bulgaria, and the US, while dogmatism was significant in Poland and the US. The US is the only truly legalistic population as it was only the country where rights perception matters. Interestingly, in France, general attitudes do not have an isolated impact.

The model explains less regarding the ban on the right to assembly for both extremist groups in all the countries. France is the exception where, in the case of those who want to ban rights for fascists, there is a strong tendency toward militant democracy. In France, age, a higher level education, and anti-welfarism increases the tendency toward militant democracy. Legal consciousness seems to have regular independent explanatory power only in the case of Americans. In regard to rights restrictions, dogmatism, liberty, and rights consciousness had independent explanatory power (beyond the perceived threat) of the variance of the restriction of rights while no such regular influence was observed elsewhere (and in Hungary, for example, there was no independent impact at all). It follows that either legal consciousness is less developed (measured in these indicators) among Europeans or the legal consciousness indicators were developed using an American sample and therefore have little or lower predictive power in Europe. In this second case, American legal values are imposed on Europe in the form of the tools of measurement.

Welfare expectations

One would expect that a lasting legacy of communism on legal consciousness would be the level of expectations of state-provided services, in particular in the area of job security and the related institutional mechanism (state ownership as a guarantee for employment).

Social welfarism was measured only in one dimension: the state's role in providing the right to work. The relative questions (three) scored in the same factor. I use values computed through regression.

As the data illustrates, the differences are striking between the US (rejecting such services), Russia (still in the welfare expectation world), and the rest of the sample. There are no significant differences among the European countries, except in France and Poland. It is remarkable that, contrary to the democratization hypothesis, Bulgaria did not score higher for welfare.

Summaries of FACI–4	REGR factor score 1 for analysis 1		
By levels of COUNTRY	C O U N T R Y		
Variable Value Label		Mean	Std Dev
For Entire Population		.0020953	1.0006759
COUNTRY 1.00	BULGARIA	-.1872713	.9703391
COUNTRY 2.00	FRANCE	-.1060531	.9038568
COUNTRY 3.00	HUNGARY	-.1827291	.9195413
COUNTRY 4.00	POLAND	-.2638038	.8662509
COUNTRY 5.00	RUSSIA	-.3515400	.5794449
COUNTRY 6.00	SPAIN	-.2013035	.6960003
COUNTRY 7.00	UNITED STATES	1.3516282	.7999414

REGR factor score 1 for analysis 1
By Variable COUNTRY COUNTRY

Multiple Range Tests: Scheffe test with significance level .05

The difference between two means is significant if
MEAN(J)-MEAN(I) >= .5942
* RANGE * SQRT(1/N(I) 1/N(J))

Mean	COUNTRY						
	5	4	6	1	3	2	7
-.3515 Grp 5							
-.2638 Grp 4							
-.2013 Grp 6							
-.1873 Grp 1	*						
-.1827 Grp 3	*						
-.1061 Grp 2	*	*					
1.3516 Grp 7	*	*	*	*	*	*	

Within Groups Total 5853		.0020953	.8403381		4128.25899
Source	Sum of Squares	d.f.	Mean Square	F	Sig
Between Groups	1731.6543	6	408.6973	288.6090 .0000	
Within Groups	4128.2590	5846			.7062
Eta = .5436 Eta Squared = .2955					

Are legal attitudes and, specifically the concept of rights, important in determining one's expectation of the state's provision of welfare? The respondents were asked about the importance of the right to a job, and this right was considered generally important, with Americans scoring lower. Among Russians, the importance of the right to a job was also mentioned with lesser frequency. This result contradicts all expectations (given the very high Russian expectation of government provided employment). This can be explained by Russian rights nihilism. Indeed, among Russians, there was no correlation between the two answers. (Other inter-country differences were not significant.)

HOW IMPOROTANT-RIGHT TO A JOB				
By levels of COUNTRY		COUNTRY		
Variable	Value Label		Mean	Std Dev
For Entire Population			4.7492	.7313
COUNTRY	1.00	BULGARIA	4.8476	.4824
COUNTRY	2.00	FRANCE	4.8817	.4521
COUNTRY	3.00	HUNGARY	4.7808	.6582
COUNTRY	4.00	POLAND	4.7785	.6832
COUNTRY	5.00	RUSSIA	4.6938	.7977
COUNTRY	6.00	SPAIN	4.8892	.3951
COUNTRY	7.00	UNITED STATES	4.3291	1.2334
Total Cases = 5935				
Missing Cases = 81 or 1.4 Pct				

Within Groups Total		4.7492	.7100	2947.3389	5854
Source	Sum of Squares	d.f.	Mean Square	F	Sig
Between Groups	182.5326	6	30.4221	60.3521	.0000
Within Groups	2947.3389	5847	.5041		.7062

Eta = .2415

Eta Squared = .0583

Scheffe's post analysis

Mean		COUNTRY						
		6	5	3	7	1	2	4
4.3291	Grp 7							
4.6938	Grp 5	*						
4.7785	Grp 4	*						
4.7808	Grp 3	*						
4.8476	Grp 1	*	*					
4.8817	Grp 2	*	*					
4.8892	Grp 6	*	*					

The issue is only loosely perceived in terms of rights. With more insistence on the right to a job, there is a somewhat stronger correlation between the attitude that the state should provide services (R = .23) with the importance of the right to have a job. If one controls both for country and education, it turns out that in some countries (Bulgaria, France, Russia, and Spain), there is no significant correlation between the expectation of the service and rights. In Hungary, only in the case of those with higher education is there a correlation, while in Poland and in the US at all education levels, rights seem to have an impact on expectations (up to r = .34 among American high school degree holders).

As the appendix indicates, in the regression analysis, in certain countries a considerable amount of variance of the expectation of state services was explained by legal consciousness indicators and social status indicators. Indeed the percentage did not considerably increase with the addition into the model of social status related indicators. On the other hand, age, gender, education, and church attendance combined have a strong explanatory power per se on the variance in some countries (Multiple R = 0.35 to 0.40 in France, US, and Hungary). Once again, the democratization thesis does not help. In every model, the level of education is of considerable explanatory power but, regarding other legal consciousness or status related indicators, the models are different in each country. For example, dogmatism was related to welfarism in Hungary and Poland while it had no significant impact in the US. Liberalism was important (except in the US) and, in some countries, normalization of everyday deviance (small scale bribery) also played a role. (For the influence of rights see above.) As to indicators of individualism, a strong communal sense is significantly correlated in Hungary (r = .2) as well as in Poland and Bulgaria. In Spain and France, however, this factor did not show significant correlation. A different factor of societal orientation (a harmonization of individualism and societal goals) seemed to be significantly related.

In each country, there was rather strong relationship between concepts of state ownership and the state's responsibility for their citizenry's lives

In most countries, education correlated negatively with welfare expectations. In other words, the higher the level of education, the less the reliance on state provided job security. The explanatory power is particularly strong (based on regression analysis) in Hungary (eta squared = .17 and in the US eta squared = .10) while it was not significant in Spain where the indicator seems to be less related to any of the factors (indicators) analyzed.

The perception of socio/political changes in most countries has an impact on legal attitudes. In Hungary, France, Poland and Bulgaria the correlations print in the expected direction, ie. the satisfaction with political change is related with less welfare expectancy (winners do not need that) and the satisfaction with democracy slightly but significantly correlates with the rejection of welfarism. The correlation is stronger among the university educated (in Hungary r=0.46).

Correlation Coefficients					
COUNTRY	**FAC1-4**	**AGE**	**ATTEND**	**CHG89**	**DEGREE4**
1.00 BULGARIA	1.000 (1194) P= .	-.0805 (1188) P= .006	-.0419 (1162) P= .153	-.1358 (939) P= .000	.1604 (1191) P= .000
2.00 FRANCE	1.000 (752) P= .	.1966 (746) P= .000	.0772 (738) P= .036	-.1578 (644) P= .000	.1486 (752) P= .000
3.00 HUNGARY	1.000 (753) P= .	-.0728 (753) P= .046	-.0884 (750) P= .015	- .3791 (703) P= .000	.3914 (752) P= .000
4.00 POLAND	1.000 (817) P= .	.0546 (815) P= .119	-.1050 (816) P= .003	-.2267 (714) P= .000	.1924 (805) P= .000
5.00 RUSSIA	1.000 (759) P= .	-.1226 (758) P= .001	.0342 (738) P= .353	NA. (0) P= .	NA. (0) P= .
6.00 SPAIN	1.000 (771) P= .	-.0995 (771) P= .006	-.0429 (756) P= .239	-.0848 (515) P= .054	.0751 (769) P= .037
7.00 UNITED STATES	1.000 (807) P= .	.1336 (791) P= .000	.0010 (783) P= .977	.NA (0) P= .	.3193 (797) P= .000

Table 8.

Conclusion

Contrary to prevailing political-science stereotypes the differences in legal representation in seven countries with different conditions of socio-legal socialization do not differ fundamentally in terms of post political regime. There seems to be less difference between countries with democratic traditions and those with communist traditions the between the US and the rest of the countries involves in the survey, if controlled for age, education and sex.

APPENDIX

COUNTRY: 1.00 BULGARIA

**** MULTIPLE REGRESSION ****

Pairwise Deletion of Missing Data

Equation Number 1 Dependent Variable... FAC1–4
REGR factor score 1 for a
Block Number 1. Method: Enter

FACDOG1 FACIMP1 FACJUST1 FACLIB1 FACRIGH1 FACRL1 FACRL2 FACRIGH2 FACTOL1 AGE ATTEND DEGREE4 GENDER

Variable(s) Entered on Step Number

1..	GENDER	GENDER OF RESPONDENT
2..	FACDOG1	Factor score DOGMATISM
3..	FACRIGH1	Factor score RIGHT1
4..	AGE	
5..	FACTOL1	Factor score TOLERANC
6..	FACRL1	REGR factor score 1 for analysis 1
7..	ATTEND	FREQUENCY OF ATTENDING RELIGIOUS SERVICE
8..	FACIMP1	Factor score IMPORTANT
9..	FACRL2	REGR factor score 2 for analysis 1
10..	FACLIB1	Factor score LIBERAL
11..	FACJUST1	Factor score JUSTIFY
12..	FACRIGH2	Factor score RIGHT2
13..	DEGREE4	

Multiple R	.31475
R Square	.09906
Adjusted R Square	.08554
Standard Error	.92791

Analysis of Variance

	DF	Sum of Squares	Mean Square
Regression	13	81.98887	6.30684
Residual	866	745.64055	.86102

F = 7.32487
Signif F = .0000

COUNTRY: 1.00 BULGARIA

* * * * MULTIPLE REGRESSION * * * *

Pairwise Deletion of Missing Data
Equation Number 1 Dependent Variable... FAC1–4
REGR factor score 1 for a

Variable	B	SE B	Beta	T	Sig T
FACDOG1	-.103545	.035653	-.102079	-2.904	.0038
FACIMP1	-.082341	.035316	-.079166	-2.332	.0200
FACJUST1	.016144	.085781	.006443	.188	.8508
FACLIB1	.223952	.040156	.190576	5.577	.0000
FACRIGH1	-.023108	.037170	-.021462	-.622	.5343
FACRL1	.007159	.029701	.008168	.241	.8096
FACRL2	.037813	.029442	.043820	1.284	.1994
FACRIGH2	-.030893	.036061	-.029785	-.857	.3919
FACTOL1	-.017965	.041251	-.014545	-.435	.6633
AGE	-.001280	.001913	-.022954	-.669	.5037
ATTEND	-.019691	.017340	-.037931	-1.136	.2564
DEGREE4	.159709	.034582	.161273	4.618	.0000
GENDER	-.039644	.063847	-.020419	-.621	.5348
(Constant)	-.146133	.167502		-.872	.3832

End Block Number 1
All requested variables entered.

COUNTRY: 2.00 FRANCE

**** MULTIPLE REGRESSION ****

Equation Number 1 Dependent Variable... FAC1-4
REGR factor score 1 for a
Block Number 1. Method: Enter

FACDOG1 FACIMP1 FACJUST1 FACLIB1 FACRIGH1 FACRL1 FACRL2 FACRIGH2 FACTOL1 AGE ATTEND DEGREE4 GENDER

Variable(s) Entered on Step Number

1. GENDER GENDER OF RESPONDENT
2. FACLIB1 Factor score LIBERAL
3. FACRL2 REGR factor score 2 for analysis 1
4. FACJUST1 Factor score JUSTIFY
5. ATTEND FREQUENCY OF ATTENDING RELIGIOUS SERVICE
6. FACTOL1 Factor score TOLERANC
7. FACIMP1 Factor score IMPORTANT
8. FACRL1 REGR factor score 1 for analysis 1
9. FACRIGH1 Factor score RIGHT1
10. FACRIGH2 Factor score RIGHT2
11. AGE
12. FACDOG1 Factor score DOGMATISM
13. DEGREE4

Multiple R	.43411
R Square	.18845
Adjusted R Square	.17212
Standard Error	.82240

Analysis of Variance

	DF	Sum of Squares	Mean Square
Regression	13	101.45526	7.80425
Residual	646	436.91950	.67635

F = 11.53884
Signif F = .0000

COUNTRY: 2.00 FRANCE

**** MULTIPLE REGRESSION ****

Equation Number 1 Dependent Variable... FAC1-4
REGR factor score 1 for a

Variables in the Equation					
Variable	B	SE B	Beta	T	Sig T
FACDOG1	-.039522	.036537	-.045963	-1.082	.2798
FACIMP1	-.071443	.038823	-.069581	-1.840	.0662
FACJUST1	.322226	.068299	.181446	4.718	.0000
FACLIB1	-.060821	.035913	-.074822	-1.694	.0908
FACRIGH1	.046615	.035715	.049619	1.305	.1923
FACRL1	.025740	.030261	.032219	.851	.3953
FACRL2	-.082256	.031578	-.093244	-2.605	.0094
FACRIGH2	-.064956	.038947	-.063300	-1.668	.0958
FACTOL1	.090615	.036276	.091541	2.498	.0127
AGE	.014336	.002567	.249867	5.584	.0000
ATTEND	.016193	.018534	.032436	.874	.3826
DEGREE4	.221707	.037579	.264900	5.900	.0000
GENDER	-.095235	.066080	-.052715	-1.441	.1500
Constant)	-1.427300	.198571		-7.188	.0000

End Block Number 1
All requested variables entered.

COUNTRY: 3.00 HUNGARY

**** MULTIPLE REGRESSION ****

Equation Number 1 Dependent Variable... FAC1-4
REGR factor score 1 for a
Block Number 1. Method: Enter

FACDOG1 FACIMP1 FACJUST1 FACLIB1 FACRIGH1 FACRL1 FACRL2 FACRIGH2
FACTOL1 AGE ATTEND DEGREE4 GENDER

Variable(s) Entered on Step Number

1..	GENDER	GENDER OF RESPONDENT
2..	FACDOG1	Factor score DOGMATISM
3..	FACTOL1	Factor score TOLERANC
4..	FACRL2	REGR factor score 2 for analysis 1
5..	FACIMP1	Factor score IMPORTANT
6..	FACJUST1	Factor score JUSTIFY
7..	FACRIGH2	Factor score RIGHT2
8..	ATTEND	FREQUENCY OF ATTENDING RELIGIOUS SERVICE
9..	FACRL1	REGR factor score 1 for analysis 1
10..	FACRIGH1	Factor score RIGHT1
11..	FACLIB1	Factor score LIBERAL
12..	DEGREE4	
13..	AGE	

Multiple R	.51625
R Square	.26651
Adjusted R Square	.25038
Standard Error	.79615

Analysis of Variance

	DF	Sum of Squares	Mean Square
Regression	13	136.11193	10.47015
Residual	591	374.60407	.63385

F = 16.51839
Signif F = .0000

COUNTRY: 3.00 HUNGARY

* * * * MULTIPLE REGRESSION * * * *

Equation Number 1 Dependent Variable... FAC1-4
REGR factor score 1 for a

Variables in the Equation					
Variable	B	SE B	Beta	T	Sig T
FACDOG1	-.186604	.037280	-.203178	-5.005	.0000
FACIMP1	-.055147	.034081	-.062333	-1.618	.1062
FACJUST1	.058346	.096508	.023100	.605	.5457
FACLIB1	.065449	.037000	.069476	1.769	.0774
FACRIGH1	.093286	.036362	.100039	2.565	.0105
FACRL1	.081718	.038460	.080350	2.125	.0340
FACRL2	-.011894	.037731	-.011315	-.315	.7527
FACRIGH2	-.117921	.041133	-.109972	-2.867	.0043
FACTOL1	-.001035	.041920	-8.835E-04	-.025	.9803
AGE	.002631	.002132	.051280	1.234	.2177
ATTEND	-.019997	.015095	-.049436	-1.325	.1858
DEGREE4	.246330	.036182	.274376	6.808	.0000
GENDER	-.086341	.067191	-.046831	-1.285	.1993
(Constant)	-.507812	.187520		-2.708	.0070

End Block Number 1
All requested variables entered.

COUNTRY: 4.00 POLAND

**** MULTIPLE REGRESSION ****

Equation Number 1 Dependent Variable... FAC1–4
REGR factor score 1 for a
Block Number 1. Method: Enter

FACDOG1 FACIMP1 FACJUST1 FACLIB1 FACRIGH1 FACRL1 FACRL2 FACRIGH2
FACTOL1 AGE ATTEND DEGREE4 GENDER

Variable(s) Entered on Step Number

1..	GENDER	GENDER OF RESPONDENT
2..	FACIMP1	Factor score IMPORTANT
3..	FACRL2	REGR factor score 2 for analysis 1
4..	FACTOL1	Factor score TOLERANC
5..	AGE	
6..	FACRL1	REGR factor score 1 for analysis 1
7..	FACRIGH2	Factor score RIGHT2
8..	ATTEND	FREQUENCY OF ATTENDING RELIGIOUS SERVICE
9..	FACJUST1	Factor score JUSTIFY
10..	FACLIB1	Factor score LIBERAL
11..	DEGREE4	
12..	FACRIGH1	Factor score RIGHT1
13..	FACDOG1	Factor score DOGMATISM

Multiple R	.45113
R Square	.20352
Adjusted R Square	.18821
Standard Error	.78049

Analysis of Variance

	DF	Sum of Squares	Mean Square
Regression	13	105.22493	8.09423
Residual	676	411.79420	.60916

F = 13.28745
Signif F = .0000

COUNTRY: 4.00 POLAND

**** MULTIPLE REGRESSION ****

Equation Number 1 Dependent Variable... FAC1-4
REGR factor score 1 for a

Variables in the Equation					
Variable	B	SE B	Beta	T	Sig T
FACDOG1	-.133371	.036671	-.138274	-3.637	.0003
FACIMP1	-.024656	.031558	-.028322	-.781	.4349
FACJUST1	.226824	.089432	.092691	2.536	.0114
FACLIB1	.180928	.037921	.180941	4.771	.0000
FACRIGH1	.043915	.032366	.050448	1.357	.1753
FACRL1	.071163	.028389	.091685	2.507	.0124
FACRL2	-.015986	.032735	-.017212	-.488	.6255
FACRIGH2	-.120372	.038139	-.114365	-3.156	.0017
FACTOL1	.039914	.036292	.038902	1.100	.2718
AGE	.006064	.001884	.120114	3.218	.0014
ATTEND	-.017402	.012890	-.047976	-1.350	.1775
DEGREE4	.126432	.029104	.158620	4.344	.0000
GENDER	-.183465	.062298	-.104463	-2.945	.0033
(Constant)	-.472450	.174241		-2.711	.0069

End Block Number 1
All requested variables entered.

COUNTRY: 5.00 RUSSIA

**** MULTIPLE REGRESSION ****

Equation Number 1 Dependent Variable... FAC1–4 REGR factor score 1 for a
The following variables are constants or have missing correlations: FACJUST1 DEGREE4
They will be deleted from the analysis.
Block Number 1. Method: Enter

FACDOG1 FACIMP1 FACJUST1 FACLIB1 FACRIGH1 FACRL1 FACRL2 FACRIGH2
FACTOL1 AGE ATTEND DEGREE4 GENDER

Variable(s) Entered on Step Number

1..	GENDER	GENDER OF RESPONDENT
2..	FACRL2	REGR factor score 2 for analysis 1
3..	FACTOL1	Factor score TOLERANC
4..	FACDOG1	Factor score DOGMATISM
5..	FACRIGH2	Factor score RIGHT2
6..	FACRL1	REGR factor score 1 for analysis 1
7..	ATTEND	FREQUENCY OF ATTENDING RELIGIOUS SERVICE
8..	FACIMP1	Factor score IMPORTANT
9..	AGE	
10..	FACLIB1	Factor score LIBERAL
11..	FACRIGH1	Factor score RIGHT1

Multiple R	.32906
R Square	.10828
Adjusted R Square	.08862
Standard Error	.55317

Analysis of Variance

	DF	Sum of Squares	Mean Square
Regression	11	18.54155	1.68560
Residual	499	152.69419	.30600

F = 5.50848
Signif F = .0000

COUNTRY: 5.00 RUSSIA

* * * * MULTIPLE REGRESSION * * * *

Equation Number 1 Dependent Variable... FAC1-4
REGR factor score 1 for a

Variables in the Equation					
Variable	B	SE B	Beta	T	Sig T
FACDOG1	-.151327	.035630	-.190336	-4.247	.0000
FACIMP1	-.052918	.023808	-.100431	-2.223	.0267
FACLIB1	.094831	.039095	.111785	2.426	.0156
FACRIGH1	.026736	.022366	.055148	1.195	.2325
FACRL1	-.015664	.031039	-.022055	-.505	.6140
FACRL2	-.049042	.032163	-.065365	-1.525	.1279
FACRIGH2	.025795	.025142	.044941	1.026	.3054
FACTOL1	-.099848	.042153	-.100769	-2.369	.0182
AGE	-.002467	.001538	-.072029	-1.605	.1092
ATTEND	.021968	.017524	.054578	1.254	.2106
GENDER	-.091141	.051112	-.077771	-1.783	.0752
(Constant)	-.138217	.105941		-1.305	.1926

End Block Number 1
All requested variables entered.

COUNTRY: 6.00 SPAIN

**** MULTIPLE REGRESSION ****

Equation Number 1 Dependent Variable...
FAC1–4 REGR factor score 1 for a
Block Number 1. Method: Enter

FACDOG1 FACIMP1 FACJUST1 FACLIB1 FACRIGH1 FACRL1 FACRL2 FACRIGH2
FACTOL1 AGE ATTEND DEGREE4 GENDER

Variable(s) Entered on Step Number

1..	GENDER	GENDER OF RESPONDENT
2..	FACJUST1	Factor score JUSTIFY
3..	FACLIB1	Factor score LIBERAL
4..	FACRL2	REGR factor score 2 for analysis 1
5..	FACRIGH2	Factor score RIGHT2
6..	FACIMP1	Factor score IMPORTANT
7..	FACTOL1	Factor score TOLERANC
8..	FACRL1	REGR factor score 1 for analysis 1
9..	ATTEND	FREQUENCY OF ATTENDING RELIGIOUS SERVICE
10..	DEGREE4	
11..	FACRIGH1	Factor score RIGHT1
12..	FACDOG1	Factor score DOGMATISM
13..	AGE	

Multiple R	.16169
R Square	.02614
Adjusted R Square	.00664
Standard Error	.69369

Analysis of Variance

	DF	Sum of Squares	Mean Square
Regression	13	8.38363	.64489
Residual	649	312.30007	.48120

F = 1.34017
Signif F = .1843

COUNTRY: 6.00 SPAIN

**** MULTIPLE REGRESSION ****

Equation Number 1 Dependent Variable... FAC1–4
REGR factor score 1 for a

Variables in the Equation					
Variable	B	SE B	Beta	T	Sig T
FACDOG1	-.023399	.034765	-.030604	-.673	.5011
FACIMP1	-.051421	.041192	-.049538	-1.248	.2124
FACJUST1	-.012530	.072134	-.007273	-.174	.8622
FACLIB1	-.031667	.033508	-.043232	-.945	.3450
FACRIGH1	-.014966	.036906	-.017685	-.406	.6852
FACRL1	.052608	.034203	.064872	1.538	.1245
FACRL2	-.018384	.027423	-.026730	-.670	.5029
FACRIGH2	.009571	.047926	.008180	.200	.8418
FACTOL1	-.016766	.029071	-.023376	-.577	.5643
AGE	-.003645	.001983	-.085733	-1.838	.0665
ATTEND	-.001745	.011363	-.006763	-.154	.8780
DEGREE4	.022981	.027259	.038120	.843	.3995
GENDER	-.078902	.056433	-.056424	-1.398	.1625
(Constant)		.058942	.147876	.399	.6903

End Block Number 1
All requested variables entered.

COUNTRY: 7.00 UNITED STATES

**** MULTIPLE REGRESSION ****

Equation Number 1 Dependent Variable... FAC1-4
REGR factor score 1 for a
Block Number 1. Method: Enter

FACDOG1 FACIMP1 FACJUST1 FACLIB1 FACRIGH1 FACRL1 FACRL2 FACRIGH2 FACTOL1 AGE ATTEND DEGREE4 GENDER

Variable(s) Entered on Step Number

1.. GENDER GENDER OF RESPONDENT
2.. FACJUST1 Factor score JUSTIFY
3.. DEGREE4
4.. FACRL2 REGR factor score 2 for analysis 1
5.. FACRIGH1 Factor score RIGHT1
6.. AGE
7.. FACIMP1 Factor score IMPORTANT
8.. ATTEND FREQUENCY OF ATTENDING RELIGIOUS SERVICE
9.. FACRL1 REGR factor score 1 for analysis 1
10.. FACLIB1 Factor score LIBERAL
11.. FACTOL1 Factor score TOLERANC
12.. FACDOG1 Factor score DOGMATISM
13.. FACRIGH2 Factor score RIGHT2

Multiple R .53300 R Square .28409
Adjusted R Square .27022
Standard Error .68337

Analysis of Variance

	DF	Sum of Squares	Mean Square
Regression	13	124.34477	9.56498
Residual	671	313.35115	.46699

F = 20.48214
Signif F = .0000

COUNTRY: 7.00 UNITED STATES

**** MULTIPLE REGRESSION ****

Equation Number 1 Dependent Variable... FAC1-4
REGR factor score 1 for a

Variables in the Equation					
Variable	B	SE B	Beta	T	Sig T
FACDOG1	-.012321	.032355	-.014952	-.381	.7035
FACIMP1	-.059706	.028566	-.071193	-2.090	.0370
FACJUST1	-.360057	.076451	-.165295	-4.710	.0000
FACLIB1	.034304	.036666	.037036	.936	.3498
FACRIGH1	-.002626	.038462	-.002815	-.068	.9456
FACRL1	.143397	.037340	.134241	3.840	.0001
FACRL2	.023965	.028584	.027642	.838	.4021
FACRIGH2	-.146542	.028730	-.212532	-5.101	.0000
FACTOL1	.107155	.032251	.130647	3.323	.0009
AGE	.005998	.001574	.129418	3.811	.0002
ATTEND	-.006910	.009048	-.026014	-.764	.4453
DEGREE4	.174982	.030298	.215898	5.775	.0000
GENDER	-.109153	.053670	-.068263	-2.034	.0424
(Constant)	.121151	.153050		.792	.4289

End Block Number 1
All requested variables entered.

ACTA JURIDICA HUNGARICA
2000 41 Nos 3-4, pp. 155-166

1216-2574 / 2000 / USD 5.00

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Validity

Validity is the qualifying label of the norms in law and the acts executed in the name of the law, according to and by the force of which the norms and acts in question are recognized as the norms and the acts, respectively, of the existing legal system. This concept of validity, defining membership within the system,[1] is simultaneously completed by a concept of validity that selects and identifies the system itself. Accordingly, validity is also the qualifying label of the system itself, according to and by the force of which the system in question is recognized by the law and order of the international community as one of the national legal systems.

The concept of validity is only postulated analytically for the sake and within the frame of examination, but this does not have any reference in the outside world. In this sense, one can state that validity is an *a priori* idea not reducible to empirical terms determined by observable facts.[2] The very fact that talking about "invalid law" would actually involve a *contradictio in adjectu* (oxymoron) clearly

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1 For LIPPOLD, R.: "Geltung, Wirksamkeit und Verbindlichkeit von Rechtsnormen" *Rechtstheorie* 19 (1988) 4, 465, for instance, the meaning of *Geltung* is simply "Zugehörigkeit einer bestimmten Norm zu einer bestimmten Normenordnung."

2 CASTBERG, F.: *Problems of Legal Philosophy* 2nd ed., Oslo–London, 1957.

shows this point.[3] Accordingly, validity ascribes legal quality to the norm from the outset, and its defect or eventual withdrawal will ensue in the negation of legal quality as well.[4] The neo-kantian methodology, however, which conceives reality in terms of a rigid (and mutually impenetrable) duality between the domains of "is" and "ought", treated validity as the property of ought projections. Therefore, it dedicated particular theories to it which should only be devoted to genuine problems of legal philosophy.

Validity can be both substantive and formal. Substantive validity is an early form of the concept of validity. When law was not yet formalized, not yet embodied in forms, anything that manifested itself as part of the enforced order could become valid. For instance, in arrangements based on open reasoning, and not yet using the selective criterion of formal relevance—like the *dikaion* (justness) type of Graeco-Roman jurisprudence, the *cadi* (Umayyad courts) jurisdiction in Islamic law, the rabbinic justice in Jewish law, the domain of the *li* (as opposed to the *fa*) forming the main layer of Confucian law in China, or the *giri* (rites) in Japan—, any consideration, argument, or reference could gain substantive validity, and could thereby become a component of law, inasmuch as it proved useful to be used as a reference in the process of searching for the just solution. In the middle ages it was accepted that only the "good, old" law could get the legitimizing stamp of validity. Consequently, legal actors tried to measure against customs the dispositions of newly enthroned monarchs, and even the statutory products of reforming legislation, so that correspondence might be established between them.[5] Thus, the time-honoured practice proves its validity by itself; and, *vice versa*, ignoring the acceptance of a custom or breaking the application of it can grow into a force depriving it of validity (*desuetude*).

The formal concept of validity is the product of the *ius* (right) reduced to the *lex* (statute). Its development can be traced down from the Roman imperial era

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3 FUCHS, A.: *Die Rechtsgeltung*, Vienna, 1933, 10, and PECZENIK, A.: "The Concept 'Valid Law'", *Scandinavian Studies in Law* 18 (1972), 213 et seq. at 214.

4 According to Fuchs, the proposition of "Dieser Rechtssatz gilt nicht mehr" is self-contradictory (or at least redundant) as the act of enacting involves already the positing of validity. Accordingly, the criticism of EKELÖF, P. O.: "The Expression 'Valid Rule': A Study in Legal Terminology" *Scandinavian Studies in Law* XV (1971), 61, namely that the validity of a legal rule is always limited in time, has no relevance here, as the proposition of "Dieser Rechtssatz gilt nicht mehr" is just on the transmutation of both validity and—with it—the legal quality.

5 KERN, F.: 'Law' in his *Kingship and Law in the Middle Ages* (1919), trans. S. B. Chrimes, Oxford, 1968, 149ff.

to the institutionalization of the modern formal law. Modern law provides that, independent of substantive criteria, any enactment can gain legal validity if issued (promulgated) by a certain authority through a certain procedure in a certain form; the enactment keeps its validity until the competent authority puts an end to it either expressly (for instance, through the repealing act of derogation) or implicitly (for instance, by counterregulation) through a formal procedure.[6] Accordingly, validity is on the final analysis the satisfaction of criteria needed for gaining membership in law which may be done through appropriate enactment.[7] Theoretical reconstruction names this as validity transfer and validity derivation within the system; it is ideal-typical, but is the only one acceptable in any normative justification or reference. In the continental law of Europe, Hans Kelsen's vision, described in his so-called theory of gradation, derives the origin of the legal order from the so-called basic norm, and this legal order has a hierarchical and pyramidal construction through its consistent derivation.[8] In Anglo-American law, H. L. A. Hart distinguishes between primary and secondary rules, the former providing the

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6 "According to the concept of systemic validity a rule *R* is valid in legal system LS if the following conditions are fulfilled: (a) *R* is enacted according to the rules valid in LS and thus has come into force; or (b) *R* is an acknowledged consequence of the rules valid in LS; (c) *R* has not been formally repealed (»derogated«); (d) *R* is not inconsistent with the rules valid in LS; (e) if *R* is inconsistent with any rule valid in LS then (ea) *R* is not treated as invalid according to the rules about conflict between legal rules or (eb) *R* is interpreted in such a way as to eliminate the inconsistency in question." WRÓBLEWSKI, J.: "Validity of Law and Decision of Validity" in his *The Judicial Application of Law*, Dordrecht, Boston, London, 1992, 77. [Law and Philosophy Library].

7 This may be phrased as "exclusivement une référence à la régularité du mode de production de la norme" [PERRIN, J. F.: *Pour une théorie de la connaissance juridique* Paris–Genève, 1979, 95 et seq.], meaning that "cette norme satisfait aux normes qui règlent l'appartenance des normes au système" [SCARPELLI, U.: *Qu'est-ce que le positivisme juridique?* {Cos'è il positivismo giuridico (Milano: Communità 1965)} trans.: Colette Clavreul, Paris–Bruxelles, 1996, 39 {La pensée juridique}], as "it has been duly promulgated" [MÁYNEZ, E. G.: "The Philosophical-juridical Problem of Validity of Law" in *Latin-American Legal Philosophy*, Cambridge, 1948. {The 20th Century Legal Philosophy Series III}], that is, "it has been issued by a competent organ in accordance with the appropriate procedure" [VALDÉS, E. G.: "Algunos modelos de validez normativa" *Revista Latinoamericana de Filosofía* III (Mars 1977) 1, 41–68, shortened as "Two Models of Legal Validity: Hans Kelsen and Francisco Suárez" in *Normativity and Norms* Critical Perspectives on Kelsenian Themes, ed.: Stanley L. Paulson & Bonnie Litschewski-Paulson, Oxford, 1998, 265].

8 KELSEN, H.: *Reine Rechtslehre*, Vienna, 1934, ch. V.

genuine regulation, and the latter making and amending the former, that is, disposing of the conditions of their validity-granting and validity-ending.[9]

Leaving behind the substantive understanding of validity in the modern age, its formal new concept introduces a criterion of validity easy to prove even amidst circumstances of bureaucratic mass application, not recoursing any longer to a jurisprudence based on generations' experience of "good, old" custom, which is hard to ascertain in judicial practice. By the act that (1) any product issued by the competent agent (2) through the appropriate procedure—the fulfilment of which is (for the ease of practical identification) usually (3) manifested by its textual promulgation in the official gazette—will be accepted as a valid part of the law independently of any (further) substantive consideration, processual criteria will on the final analysis appear as formal ones.[10] Well, Hart is unambiguous in what Kelsen's theory of gradation is ambivalent about, namely whether the final criteria of formal validity are purely (and doubly) formal in the sense that a formal (i.e., procedural) aspect is defined formally in them, or they are (simply) formal in the sense that a substantive aspect (i.e., derivability) is defined formally in them. For the question of whether or not an individual norm is "issued in accordance with [the constitution]"[11] can be interpreted in the sense of formal procedurality (identified by agents and processes) and of substantive derivability (identified by contents of superior norms, or, at least, by the exclusion of the logical exclusion of derivability) equally. The latter interpretation is shared explicitly by scholars who propose "conclusion" and "freedom from contradictions" to add as complementary criteria to validity.[12] (In some Germanic cultures,

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9 "While primary rules are concerned with actions that individuals must or must not do, the secondary rules are all concerned with the primary rules themselves. Secondary rules [...] specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined." HART, H. L. A.: *The Concept of Law,* Oxford, 1960, 92.

10 In the same way as—once the *lex* has replaced the *ius*—justice in law will also be reduced to the notion of "justice of the law", that is, to what can be procedurally achieved through considerations based upon the available norms of law. Cf. VARGA, Cs.: *Lectures on the Paradigms of Legal Thinking*, Budapest, 1999. vii + 279, passim [Philosophiae Iuris].

11 KELSEN, H.: *Introduction to the Problems of Legal Theory,* trans. Bonnie Litschewski-Paulson & Stanley L. Paulson, Oxford, Clarendon Press, 1992, 62, or, "verfassungsmäßig zustandegekommene Normen" in his original *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik, Vienna, Deuticke 1934, § 30 (d).

12 Providing that validity can be derived this way indeed, what is lost on the swings would be made up on the roundabouts, for we shall arrive necessarily at a paradox, self-

ambivalence is also expressed by the duplication of meaning of the word 'validity', moreover, by the analytical distinction drawn within the range of a single concept ['*Geltung*'] while forming corresponding adjectives. "The words 'valid' and 'validity', when applied to a norm, sometimes refer to the *existence*, as such, of the norm and sometimes to the *legality* of the act as a result of which this norm came to be."[13] In the notional construction of the German '*gültig*', the Swedish '*giltig*' and the Danish '*gyldig*', on the one hand, and '*geltend*', as well as '*gällende*' and '*gældende*', on the other,[14] both ambivalence and analytical distinction are expressed by differentiating what is valid itself from what can at most gain validity as an act performed.)

What this concept suggests is immobility, orderliness, reliability, and foreseeability: objectivity independent of any subject, that is, something preestablished and pre-settled as given in things themselves from the very beginning, something internal that may sometimes be revealed to the outside observer-analyst at the most. Then, what is validity after all, and what its apparent similarity to truth can suggest? "Although legal norms cannot be said to be true or false, statements that a particular norm is valid can be either true of

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contradicting within and thereby also destroying the entire Kelsenian construction. For this would negate the basic message of Kelsen's claim that there is no quality in law except if posited by an act valid in the law. Accordingly, validity as a normative precondition of the legal quality of regulatory and declaratory acts could equally be posited by any act without such a precondition, too. Or, this is to say that we could exclusively step from one zero point, only to arrive at another zero point, when deriving legal quality.

On the other hand, considering that Kelsen's validity is the "existence", and not a "property", of law and of its individual norms, then, as contrasted to the understanding of truth in epistemology, this "existence" of the norm cannot also be its substance or aspect simultaneously. Consequently, what is ambivalent is not of Kelsen but is our interpretation at the most. Wróblewski's definition (note 6) both reproduces and misunderstands this ambivalence when he catalogues logical consequences in the extension of positive law [paras (b), (d), and (e)]. Valdés (note 7), for instance, contradicts this position (261–265): "Kelsen's basic postulates: (1) The validity of a norm cannot be inferred from, or based on, facts. (2) The validity of a norm is its specific form of existence. (3) When a norm is valid (that is, exists), it ought to be obeyed; and if it is disobeyed, the competent organs ought to impose a sanction. (4) A norm is valid if it has been issued by a competent organ in accordance with the appropriate procedure."

13 WRIGHT, G. H. von: *Norm and Action*, London, 1963.

14 Cf. EKELÖF: 62, and ROSS, A.: "Validity and the Conflict between Legal Positivism and Natural Law" *Revista Jurídica de Buenos Aires,* 1961, 4, reprinted in *Normativity and Norms*, 158–159, respectively.

false."[15] Well, such a recognition can substantiate a similarity in conception and methodology indeed,[16] however, it makes it clear that truth and validity are different categories covering differing issues. For—as Kelsen summarizes it in his posthumous summation—there is "no parallel: (1) validity of a norm [is] conditional upon the act of will of which it is the meaning, [and] truth of a statement [is] not conditional upon the act of thought of which it is the meaning; (2) the validity of a norm is its existence, [and] the truth of a statement is a property of the statement; (3) the validity of a norm is relative to time, [and] the truth of a statement is not relative to time."[17]

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Actually, law is a system which is both dynamic and open and, as opposed to any view suggesting a static closure,[18] shows various possibilities of feedback for its internal mechanisms of validation.[19] The vertical view of how validity originates hierarchically from the apex norm is complemented or eventually replaced by the practice of confirming validity horizontally, or upwardly, in a mutual and circular path between normative sources at similar and differing levels.[20] As compared with Kelsen's and Hart's pyramidal conception based

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15 CHRISTIE, G. C.: "The Notion of Validity in Modern Jurisprudence" *Minnesota Law Review* 48 (1964), 1050.

16 Considering (1) compatibility within the system, (2) empirical experience and (3) fecondity with explicative force, parallelity is seen between validity and truth (*prescriptio* and *descriptio*) by WOLENSKI, J.: "Truth and Legal Validity" *Archiv für Rechts- und Sozialphilosophie* (1985) Beiheft 25, 205–210, and NIINILUOTO, I.: "Truth and Legal Norms" *idem*, 168–190. Cf. also NIINILUOTO, I.: "On the Truth and Norm-propositions" *Rechtstheorie* (1981) Beiheft 3. FARRELL, M. D.: *Hacia un criterio empirico de validez*, Buenos Aires, 1972. concludes even to the laws' verifiability upon the basis of Moritz Schlick's so-called logical empirism. See also HOERSTER, N.: "'Wirksamkeit', 'Geltung' und 'Gültigkeit' von Normen: Ein empiristischer Definitionsvorschlag" in *Gedächtnisschrift für René Marčic*, Berlin, 1983, 585 et seq.

17 KELSEN, H.: *General Theory of Norms* [Allgemeine Theorie der Normen, Vienna, 1979] trans.: Michael Hartney, Oxford, 1991, 170–174.

18 Legal positivism in its dogmatic (extreme) understanding is predisposed to suggest absolute validity with binding force taken as a "Kadavergehorsam". VERDROSS, A.: *Abendländische Rechtsphilosophie*, Vienna, 1958, 252–254.

19 ECKHOFF, T.: "Feedback in Legal Reasoning and Rule Systems" *Scandinavian Studies in Law* 22 (1976), 39ff.

20 KRAWIETZ, W.: "Die Lehre von Stufenbau des Rechts – eine säkularisierte politische

upon the idea of an unidirectional (vertical) derivaton, circularity presupposes from the very beginning the idea of total validity, on the one hand, and a gapless series of part validities, on the other, each and all of them made up by acts of mutual confirmation through the entire process of legal practice by reference also to "rules of smaller scope".[21] According to Jerzy Wróblewski, the possibility that discrepancies or contradictions result from the dynamism of law in practice justifies the differentiation of formal validity into systemic validity reflecting the extension of the "law in books",[22] and validity in force covering the domain of the "law in action".[23]

Membership of a norm in the legal system and its actual enforceability are increasingly taken as a unity. According to Joseph Raz, the criterion of this unity must be expressed in the recognition that "the rules recognised and enforced in *s* are legally valid in accordance with *s* but are not thereby themselves part of the legal system *s*". This has regard to the foreign laws invoked by private international law, to the law of religious and ethnic groups, or the rules of voluntary associations. These show that "validity according to law is broader than membership of the legal system".[24]

Evidently, the legal quality of the system, that is, its validity, cannot be measured by a criterion from within the system. First the validity of the basic norm has to be posited so that further norms can then be derived from it.[25] Validity requires completion by another standard, as well. Hans Kelsen stated:[26]

Theologie?" *Rechtstheorie* Beiheft 5: Rechtssystem und gesellschaftliche Basis bei Hans Kelsen, Berlin, 1984, 255ff.

21 MUNZER, S.: *Legal Validity*, The Hague, 1972, vii + 74, noting that there is "no single rule at the apex of a legal system which serves as the touchstone of validity".

22 Termed as "legal validity" [von WRIGHT, G. H.: *Norm and Action*, London, 1963, ch. X, §§ 5–6], "intra-systemic validity" [Scarpelli, ch. VII], "constitutional validity" [SCHREIBER, R.: *Die Geltung von Rechtsnormen*, Berlin–Heidelberg–New York, 1966, ch. III § 2], "formal conception of validity" [NOWAK, L.: "Cztery koncepcje obowiazywania" *RPES*, 1965, 2, 97 et seq.], and—last but not least—"systemic validity' [RAZ, J.: *The Authority of Law*, Oxford, 1979, 150 et seq.].

23 WRÓBLEWSKI, J.: "Three Concepts of Validity of Law" *Tidskrift utgiven av juridiska föreningen in Finland*, 118 (1982), 406 et seq. at 410ff.

24 RAZ, J.: "Legal Validity" *Archiv für Rechts- und Sozialphilosophie* LXIII (1977), 339. et seq. at 342.

25 BULYGIN, E.: "Sobre el fundamento de validez" *Notas de filosofía del derecho* [Buenos Aires] I (1964), 23–33 and VALDÉS: 263–271.

26 KELSEN, H.: *General Theory of Law and State*, Cambridge, 1945, 41f. And Kelsen continues: "The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A *conditio sine qua non*, but not a *conditio per quam*. The efficacy of

> "Although validity and efficacy are two entirely different concepts, there is nevertheless a very important relationship between the two. A norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious. Thus, efficacy is a condition of validity; a condition, not the reason of validity. A norm is valid because it is efficacious; it is valid if the order to which it belongs is, on the whole, efficacious."[27]

In this double understanding of the concept of validity, the legal and the sociological,[28] the normative and the real,[29] the systemic and the factual finally meet, despite Kelsen's strict distinction between the domains of "is" and "ought". This means that the feasibility of any normative expectation can only be grounded by the prevailing factuality. Recognizing Ludwig Wittgenstein's fundamental ontological fact of language use, Hart writes: "No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way."[30] As Joseph Raz formulated it: "Those ultimate rules of recognition are binding which are actually practiced and followed by the courts."[31] Thereby the "is" evidently grounds the "ought" by unfolding its ontological priority.[32]

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the total legal order is a condition, not the reason for the valididty of its constituent norms. [...] The principle of legitimacy is restricted by the principle of effectiveness." 119.

27 Cf. also NINO, C.: "Some Confusions around Kelsen's Concept of Validity" *Archiv für Rechts- und Sozialphilosophie* LXIV (1978) 3, 57–89, and GUEST, S.: "Two Problems in Kelsen's Theory of Validity" *The Liverpool Law Review* II (1980) [Jurisprudence Issue], 101–108.

28 E.g., EKELÖF: *op. cit.* 63.

29 Or, legal and real, in KLUG, U.: "Rechtslücke und Rechtsgeltung" in *Festschrift für Hans Carl Nipperdey*, ed.: R. Dietz and H. Hübner, I, München Berlin, 1965, 71–94.

30 HART: *op. cit.* 105f.

31 RAZ: *op. cit.* 344.

32 E.g. GARRN, H.: "Rechtswirksamkeit und faktische Rechtsgeltung: Ein Beitrag zur Rechtssoziologie" *Archiv für Rechts- und Sozialphilosophie* 55 (1969), 161–181, treats the relationship as a re-transformation from "ought" to "is". A predictive function concerning the future behaviour of judges is attributed to the notion of validity as an "ought" re-reflected upon "is"—"taken as a complex of social facts"—by ROSS, A.: "Validity and the Conflict between Legal Positivism and Natural Law" *Revista Jurídica de Buenos Aires* (1961) 4, 46–93, reprint in *Normativity and Norms*, 159–160. Cf. also MENEGHELLI, R.: *Il problema dell' effettività nella teorie della validità giuridica*, Padua, 1964.

There is a number of other formulations as well. Following Wróblewski's pattern,[33] for instance, Aulis Aarnio differentiates systemic, factual, and axiological concepts of validity to emphasize acceptability in addition to validity and efficacy.[34] Ralf Dreier offers also a tripartite definition according to which "A legal norm is valid sociologically when both its followance and non-followance is sanctioned; legally, when it is worded so by the competent organ in the procedural way; and morally, when it can be seen as ethically justified."[35] On his turn, among others,[36] François Ost distinguishes formal, empirical and axiological concepts of validity for that legality, effectivity and legitimity can be shown in inter-secting circles as potentialities and stages of development of both the static construction and the dynamic formation of law.[37] According to a further, personalist trend, validity lies in the law's idea and the latter's communal recognition.[38] Some approaches offer a rather complex perspective. Karl Larenz enumerates normative, sociological, psychological and ontological understandings of validity.[39] This is re-echoed by Stephen Munzer's distinction in questioning "whether something is able to produce or accomplish what is appropriate or intended" (standing for validity and efficacy), and "whether or not something is in being" (standing for existence).[40]

All these variations at conceptualisation are on the final account mere attempts at delimiting the bordering line that can be drawn between the realms of "is" and "ought" through defining the latter's boundaries, quality, sources and powers, as well as the mechanism of its working. This is an impossible yet

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33 WRÓBLEWSKI: "Three Concepts", *op. cit.* 409–417.

34 AARNIO, A.: "On the Validity, Efficacy and Acceptability of Legal Norms" in his *Philosophical Perspectives in Jurisprudence*, Helsinki, 1983, 152–163 [Acta Philosophica Fennica 36] and in *Objektivierung des Rechtsdenkens* Gedächtnisschrift für Ilmar Tammelo, ed.: Werner Krawietz, Theo Mayer-Maly, Ota Weinberger, Berlin, 1984, 427–437. For a similar tripartite division, see BOUCKAERT, B.: "Gelding en bindende kracht van de rechtsnorm in rechtsdogmatiek, rechtssociologie en rechtsfilosofie" *R. W.* (1975) 20, 1217 et seq.

35 DREIER, R.: "Recht und Moral" [1980] in his *Recht—Moral—Ideologie* Studien zur Rechtstheorie, Frankfurt am Main, 1991, 194 [Suhrkamp Taschenbuch Wissenschaft 344].

36 With "obligatoriness" [LIPPOLD: *op. cit.* 463–489] or a "*de lege ferenda* ideality" [SCHREIBER: *op. cit.* 58 et seq.] as the third element.

37 OST, F.: "Validité" in *Dictionnaire encyclopédique de théorie et de sociologie du droit* 2e éd. corrigée et augmentée, dir.: Anré-Jean Arnaud, Paris, 1993, 635 and 638.

38 TAKESHITA, K.: "Der Geltungsgrund des Rechts" *Kansai University Review of Law and Politics*, (March 1981) No 2, 1–14.

39 LARENZ, K.: *Das Problem der Rechtsgeltung*, Berlin, 1929, (reprint 1967), 9ff.

40 MUNZER: *op. cit.* passim.

unavoidable task notwithstanding. According to one of Kelsen's earliest realisations, entering—by making—the law is "a great mystery"[41] that can at most be hypothesised but not derived. For we are either within or without the law; we can only enter it by the previous declaration of having already been within; paradoxically—as with any *deus ex machina* solution—this declaration presupposes (by having advanced ideally and posited as a logical premise) exactly that what we cannot derive in an analytically consequential way from. For the stepping stones of derivation are either premises already presumed implicitly from the beginning or they are ones argued actually (and arguable at all in principle) circularly all around, based upon that what should have been proved.

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Kinds of legal realism—based upon the everyday professional experience in English-American and Nordic law—are characterised by a more differentiated conceptual representation, solving the doctrinally oriented understanding of validity in the actual practice of power-conferring. "Validity is a concept special to institutional normative orders, since it is the conceptual tool for distinguishing between that which is operative within the system and that which is not."[42] This rather pragmatic approach suggests from the beginning that validity is not a property inherent in any way *in se* and/or *per se* in the norm itself. Validity can only be revealed, ascertained and confirmed through an act of interpretation taking place in a linguistic game,[43] and this is to say thay both law and procedure, theory of games and linguistic use are also in a position to afford relevant aspects.[44] All this concludes to stating that systemic validity is self-

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41 KELSEN, H.: *Hauptprobleme der Staatsrechtslehre* entwickelt aus der Lehre vom Rechtssatze, Tübingen, Mohr, 1911, 411.

42 MacCORMICK, N.: "Powers and Power-conferring Norms" in *Normativity and Norms*, 500–501.

43 VANQUICKENBORNE, M.: "Quelques réflexions sur la notion de validité" *Archives de Philosophie du Droit* 1968, 185 et seq. For a criticism, see SCHREIBER: *op. cit.* 159. It is to be noted that Wróblewski ["Three Concepts", 409] considers the "formal and interpretative consequences" of the enacted valid norms the natural components of systemic validity.

44 "[L]es usagers de la langue en sont à la fois les auteurs et les juges." OST, F.: "Le code et le dictionnaire: Acceptabilité linguistique et validité juridique" *Sociologie et sociétés* XVIII (avril 1986) 1, 59–75, and "Essai de définition et de caractérisation de la validité juridique" in OST, F. –van de KERCHOVE, M.: *Jalons pour une théorie critique du droit*, Bruxelles, 1987, 309 et seq. and, as to the application of the point of view of the theory of games, pp. 312 et seq. [Travaux et recherches 9].

related and auto-referential,[45] moreover, the practice of validity confirmation is eventually self-closing: it draws its own boundaries incessantly and consequently whilst it makes the expectations addressed to its own operation fulfilled.[46] This autopoiesis in practice explains why validity is seen by some authors more as a priority list of expectations to be met preferentially in a complex of practical setting than a simple catalogue enumerating exhaustively all criteria that are of a *sine qua non* character and are to be fulfilled absolutely.[47]

Within the framework and intellectual horizon of contemporary pragmatism, Scandinavian legal realism is the trend that has transformed value as an axiological element into a social psychological phenomenon which results, stepping from acts of social identification and action, in the common acceptance of the law's obligatoriness. "An order is created once partners to it are agreed upon excepting it together."[48] This is the background that justifies Alf Ross concluding that

> "Validity in the normative sense has no function in describing and explaining reality. Its function is to reinforce the legal system by proclaiming that the legal obligations of the system are not merely legal obligations backed up by sanctions, but also moral duties. The normative notion of validity is an ideological instrument supporting the authority of the state."[49]

This self-destruction of the very idea of validity has served as a pattern for the discursive theory of law with the claim of optimum consensus at its background within the conceptualisation of the State as a democratic *Rechtsstaatlichkeit*,[50] which, once accepted, has ascribed a consensus-dependent context to the ideal of

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45 LUHMANN, N.: *A Sociological Theory of Law*, London–Boston–Melbourne–Henley, 1985, 285, and "Die Geltung des Rechts" *Rechtstheorie* 22 (1991) 3, 273–286.

46 Cf. VARGA: *Lectures on the Paradigms of Legal Thinking*, passim.

47 "[I]n comparison with the speech act theory, rather then requiring that all conditions be positively satisfied, the proposed schema [of validity] requires only that a given condition not be shown not to have been satisfied". PAULSON, S. L.: "Neue Grundlagen für einen Begriff der Rechtsgeltung" *Archiv für Rechts- und Sozialphilosophie* 65 (1979), 1–19.

48 HEINZ, E. K.: "'Geltung' und 'Verbindlichkeit' im Bereich normativer Ordnungen" *Archiv für Rechts- und Sozialphilosophie* 55 (1969), 355–366. For an earlier advance, see ROSS, A.: *On Law and Justice*, Copenhagen, 1958, 36–38.

49 ROSS: *"Validity and the Conflict"*, 147–163.

50 HABERMAS, J.: *Faktizität und Geltung* Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats (1992).

validity,[51] moreover, it has even elevated it to serve as its mere criterium[52] in the long and open-chanced process of the apparent dissolution and transitory transformation of the very core element of the concept.[53]

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51 Cf., e.g., *Rechtsgeltung und Konsens* ed.: G. Jakobs, 1976.

52 Cf., e.g., LÜDERSSEN K.: 'Juristische Topik und konsensorientierte Rechtsgeltung" in *Festschrift für Helmuth Coing* 1 (1982), 549.

53 For further issues in quest for validity, cf. ALEXY, R.: *Begriff und Geltung des Rechts* 2nd ed., 1994; BARROS, E.: *Rechtsgeltung und Rechtsordnung,* 1984; CONTE, A. G.: "Studio per une teoria della validità" *Rivista internazionale di Filosofia del diritto* XLVII (1970), 31 et seq. and "Validità" in *Novissimo Digesto Italiano* XX (Torino 1974); Fariñas DULCE, M. J. F.: *El problema de la validez jurídica,* Madrid, 1991; HUSSERL, G.: *Rechtskraft und Rechtsgeltung,* 1925; KAUFMANN, A.: *Das Gewissen und das Problem der Rechtsgeltung,* 1990; NEUMANN, U.: "Theorien der Rechtsgeltung" in W. Hassemer–Volkmar Gessner (ed.) *Gegenkultur und Rechts* (1985), 21 et seq.; OPALEK, K.: "The Problem of the Validity of Law" *Archivum Iuridicum Cracoviense* III (1970); TAKESHITA, K.: "Recht und Geltung" *Kansai University Review of Law and Politics* (March 1980) No. 1, 1–19; SUMMERS, R. S.: "Toward a Better General Theory of Legal Validity" *Rechtstheorie* (1984) 4, 65–83; VARGA, Cs.: "Geltung des Rechts – Wirksamkeit des Rechts" in *Die gesellschaftliche Wirksamkeit des sozialistischen Rechts* ed. K. A. Mollnau, Berlin[East], 1978, 138–145 and "Heterogeneity and Validity of Law: Outlines of an Ontological Reconstruction" in *Rechtsgeltung* ed. Csaba Varga–Ota Weinberger, Stuttgart, 1986, 88–100 [Archiv für Rechts- und Sozialphilosophie, Beiheft 27], both reprinted in VARGA, Cs.: *Law and Philosophy* Selected Papers in Legal Theory, Budapest, 1994, 35–42 and 20–218 [Philosophiae Iuris], as well as *The Place of Law in Lukács' World Concept,* Budapest, 1985 (reprint 1998) 193, passim; WELZEL, H.: *An den Grenzen des Rechts* Die Frage nach der Rechtsgeltung, 1966, and "Macht und Recht, Rechtspflicht und Rechtsgeltung" in *Festschrift für K. G. Hugelmann* 2 (1959), 833 et seq.; WOLF, E.: "Il problema della validità nella prospettiva di une ontologia del diritto" *Rivista internazionale di filosofia del diritto* XXVI (1959) IV; WRÓBLEWSKI, J.: "Problems of Objective Validity of Norms" *Rechtstheorie* 14 (1983), 19–28.

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Eight Finnish-Hungarian Seminar on Criminal Law

The eight Finnish-Hungarian seminar on criminal law (devoted to the topic "Internationalization and Europeanization of Criminal Law and Criminal Justice") took place in Helsinki and Turku, from 25th to 30th September 2000. The occurrences, arranged by turns in Finland and in Hungary, are founded upon the bilateral agreement between the Finnish and the Hungarian Academy of Sciences. Notwithstanding the cooperation never was limited to academician researchers, but representatives of other institutions (e.g. universities, courts) also participated at the seminars.[1] Actually the sixth event was completed to a trilateral one, because, besides the Finnish and Hungarian scholars, it was attended by two university lecturers from Estonia as well.[2] Since the previous seminar, which was arranged in Budapest and Miskolc, the sessions took place not only in the capital of the hosting country, but in an other significant university town.

The Hungarian reports are published in this number of this periodical, so I limit myself to review the presentations of the Finnish participants:

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1 *See*, FEHÉR, L.: "Hungarian–Finnish seminary in Budapest on criminal law". *Acta Juridica* Tomus 23/1–2. (1981) 225–230.

2 See, MOHÁCSI, P.: "Finn–magyar–észt büntetõjogi szeminárium (Finnish–Hungarian–Estonian Seminar on Criminal Law)", *Állam és Jogtudomány*, XXXVI/1–2. (1994) 180–192.

The seminar was opened by *Professor Raimo Lahti*, who commemorated the history of such seminars. In his introductory remarks he outlined the main tendencies concerning the internationalization and europeanization of criminal law. He examined the role of the United Nations in the global criminal policy especially in the establishment the ICTY[3] and ICTR[4] by the United Nations (UN) Security Council, the adoption of the Statute for the International Criminal Court by the United Nations Diplomatic Conference of Plenipotentiaries in Rome on July 1998, and the UN Crime Prevention and Criminal Justice Programme. Professor Lahti refers to the opinion of Professor Mireille Delmas-Marty concerning the main tendencies in European Criminal policy: the harmonization (common guiding principles, obligation of compatibility) or unification (identical rules, obligation of conformity). He shared the Scandinavian criticism against the unification of the European criminal policy, and also against the "Corpus Juris" proposal, because this tendencies can endanger the basic values of the "Nordic model" (e.g. the relatively low level of the repression in criminal sanctions).[5]

Mr. Tuomas Pöysti gave his lecture on the "European Union and the Developments towards European Criminal, Financial and Administrative Penal Law". He pointed out that the growing importance of the instruments and activities of the EU in this spheres of law should not endanger the values of the enlightenment, the humanistic traditions of Europe. He deem necessary the strengthening of the authority of the European Court of Justice in controlling the EU instruments and provide more protection for human rights and freedoms. He emphasizes that the EU does not query the legitimacy of its own activities, so it is the task of the scientific sphere.

Ms. Katariina Jahkola held forth on "Judicial Cooperation in Criminal Matters from the European Point of View". As she ascertained, in spite of the strong international political pressure, the ratification and the implementation of the international instruments is slow. It can be attributed mainly to the traditional and constitutional obstacles. She examined the new forms and tools of co-

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3 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.

4 The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between January 1994 and 31 December 1994.

5 *See more*, LAHTI, R.: "Toward an International and European Criminal Policy?" in *Liber Amicorum Bengt Broms*. (Ed. Tupamäki Matti) Finnish Branch of the International Law Association , Helsinki, 1999. 222–240.

operation, e.g. direct contact between the authorities, video hearings, the application of the law of the requesting states in the requested one, if this does not run counter to the basic principles of legal order of the latter. She also dealt with the problem, that according to the new European instruments the cooperation is independent from the traditional preconditions (e.g. the double criminality) and prohibitions (e.g. the extradition of nationals). According to her, the proportionality in the national criminal law systems can be interfered if the international instruments not only contain the duty to criminalize (and the definition of the given type of crime), but also the minimum of the penalty.

The presentation of *Mr. Ari Hirvonen* "Law and Justice in the Regions' Europe" dealt with one of the basic questions of the European philosophy of law the relation among act ("*Gesetz*"), law ("*Recht*") and justice ("*Gerechtigkeit*"). As he emphasised, the recognition of the difference and the connection between this trial of concepts can be useful to understand better the traditions and the developments of the European legal culture.

Professor *Ari-Matti Nuutila* held forth on "The New Finnish General Part of Criminal Law in European Comparison". From his lecture we can form a sketchy review of the procedure of the codification and the main goals of it (e.g. the neutrality in relation to criminal law theories, comprehensive common and at the same time exact legal language, flexibility for new legal development). He thoroughly examined the requirements of the *nullum crimen / nulla poena sine lege* towards the legislation, with special regards to the rules of the EU legislation (e.g. directives), the governmental regulations authorised by an act of the Parliament, the open or closed list of qualifying circumstances, etc. He also dealt with some questions regarding the elements (preconditions) of the criminal liability (e.g. liability for omissions, intention, scope and excess of self-defence, age limit of the responsibility).

Ms. Vilja Hahto in her presentation "The Position of the Victim in the Settlement of Violent Crimes" emphasised that the crime should not be illustrated and conceived as a linear connection between the victim and the state, because it is a tree-square relation, in which the victim is also participated. She analysed the scientific theories on the role of the victim in the criminal justice system and their realisation in Finnland, especially the concept of compensation among the criminal sanctions, the role of the victim in the criminal procedure, the state sponsored reparation of the victims of violent crimes.

Mr. Heikki Jaatinen in his presentation "Corporate Criminal Liability in Finland and in the European Union" analysed the special triangular connection among the crime, the criminal and the legal person. He dealt with the necessity of the private, the corporate-criminal and personal-criminal responsibility in

relation to each other. He does not propose the application of the corporate criminal liability concerning any crime, but only in relation to special categories, e.g. environmental or economical criminality. According to him the corporate criminal liability is unsuitable answer to the challenges of organised crime, because the organised criminal simply leave the concerned firm to its fate and does not care about its punishing.

Besides the work in the sessions we were informed by Ms. Katalin Ligeti at the Open Meeting of the Finnish Section of the International Association of Penal Law (IAPL[6]) on the "Recent and Future Activities of the AIDP and Its Young Penalist".[7] In recognition of the efforts towards the establishment and development of the relations between Finnish and Hungarian criminal lawyers and researchers the medal "*Helsingiensis Universitas*" was awarded to Professor Imre A. Wiener.

All the participants of the Seminar hope that the co-operation between the Finnish and the Hungarian criminal lawyers will be remained fruitful and the tradition of such seminars will be followed by similar occasion.

M. H.

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6 *Association Internationale de Droit Penal* (AIDP).

7 See more, Ligeti K.: "Young Penalist in the Association" 127–130. in: *Csemegi Károly emlékkönyv* (ed.: Wiener A. Imre, Budapest, MTA Jogtudományi Intézet).

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2000 41 Nos 3-4, pp. 171-180

1216-2574 / 2000 / USD 5.00

Imre A. WIENER

New Elements of International Co-operation in Criminal Matters

Professor Lahti refers to the new UN programme of crime prevention and criminal justice.[1] The reorganisation of the activities of the United Nations in 1991 resulted in the creation of a special programme on the basis of which the UN General Assembly adopted the following resolution:

a. the prevention of crime within and among States,
b. the control of crime both nationally and internationally,
c. the strengthening of regional and international co-operation in crime prevention, criminal justice and the combating of transnational crime,
d. the integration and consolidation of the efforts of Member States in prevention and combating transnational crime,
e. more efficient and effective administration of justice, with due respect for the human rights of all those affected by crime and all those involved in the criminal justice system,
f. the promotion of the highest standards of fairness, humanity, justice and professional conduct.[2]

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1 LAHTI, R.: Towards an International and European Criminal Policy? In: *Liber Amicorum Bengt Broms*. (Ed. Tupamäki Matti) Finnish Branch of the International Law Association, Helsinki, 1999. 225–226.

2 46/152 (19 December 1991).

In this report I intend to point out some new elements of the international co-operation in criminal matters on the basis of the Lockerbie and Pinochet cases. I am of the opinion that this General Assembly Resolution served as a background of the UN activities in the Lockerbie case. The decision of the House of Lords in the Pinochet case was influenced by the preparation of the establishment of an International Criminal Court.[3]

I. New forms of UN activities and their ICJ support

As it is well known, the bombing of the Pan Am airliner over Lockerbie happened in Scotland on 21 December 1988. 4 years later, in 1992, the Security Council of the United Nations demanded in its Resolutions 748 (1992) and 883 (1993) that Libya submit the two accused Libyan nationals for trial before a Scottish court. The Security Council imposed economic sanctions on Libya as well.

Neither the United Kingdom, nor the United States negotiated directly with Libya. There were suspicions both in the United Kingdom and in the United States that there could be connections between the accused and the Libyan Government. Consequently, the Libyan authorities could not be trusted as far as impartial and independent criminal proceedings are concerned. The United States and the United Kingdom did not respond to Libyan requests for mutual legal assistance as required under the Montreal Convention.

Lybia refused the extradition of the two suspects referring to its domestic law that prohibited the extradition of Libyan nationals. In the meantime Libya had begun proceedings before the International Court of Justice against both the US and the UK because they had failed to meet their obligations under the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. Libya claimed its willingness to prosecute those accused of the bombing. By the prosecution Lybia can fulfill its own obligations under the Montreal Convention.

Libya reasoned on one hand that a fair trial could not be expected in either of the two countries, since any jury would be biased and on the other hand, it was not willing to surrender the suspects to the United Kingdom or the United States, referring to its own domestic law.

In a provisional order of 14 April 1992, the International Court of Justice decided that a Security Council Resolution, based on Article 103 of the UN

3 The Statute of the International Criminal Court. A Documentary History. Compiled by M. Cherif Bassiouni. Transnational Publishers, Inc. Ardsley, New York, 1998.

Charter, prevails over the obligations of the Parties under any other international agreement, including those under the Montreal Convention.

Some years went on until the United Kingdom accepted a proposal for a Scottish court trial in a third country. The United States concurred. At the request of the United Kingdom and the United States, the Netherlands expressed its willingness to host such a court on their territory.

This initiative was welcomed by the Security Council in its Resolution 1192 (1998) of 27 August 1998. The Resolution called all states to co-operate to ensure the presence of the two before a Scottish Court in the Netherlands. The above Resolution says that on the arrival of the two accused in the Netherlands, the Government of the Netherlands shall detain the two accused pending their transfer for the purpose of trial before the Scottish court. In accordance with paragraph 8 of Security Council Resolution 1192 (1998) the measures imposing economic sanctions on Libya have been suspended.

The help of the Secretary-General of the United Nations was decisive for the transfer. It was planned that the two accused persons should be transported on board of a United Nations aircraft from Libya to the Netherlands. On the 5th April 1999, the two accused were surrendered to a United Nations official at Tripoli airport in Libya. They were surrendered to the Scottish authorities in the Netherlands the same day.

On the day of the arrival of the two accused in the Netherlands, Secretary-General Kofi Annan expressed his wish that the outcome of the trial will lead to a full and permanent resumption of normal relations between Libya and the rest of the international community.

II. Trial on a foreign territory

Scottish courts have criminal jurisdiction over the accused, but this jurisdiction only means a trial court sitting at any place in Scotland. In order to meet the requirements of the Security Council Resolution to establish a Scottish court in the Netherlands further legal basis was needed, and an Agreement between the United Kingdom and the Netherlands was necessary, too.

The High Court of Justiciary Order provided the legal basis for the trial of this particular case in the Netherlands.[4] On the 18th September 1998 the United Kingdom and the Kingdom of the Netherlands concluded a bilateral agreement.

4 Statutory Instruments, 1998, No. 2251.

The Scottish Court has the power to make regulations for the purpose of fully executing its full functions. Under the Agreement: no law or regulation of the host country, which is inconsistent with a regulation of the Scottish Court, shall be applicable within the premises of the Scottish Court. Disputes concerning this and all provisions of the Agreement shall be resolved by consultation and negotiation between the parties.

The jurisdiction of the Scottish Court is limited to this trial which includes preparations for the trial, any determination of law or fact and the imposition of penal sanctions, and any appeal following conviction, all in accordance with Scottish law and practice. As the Agreement is bilateral instrument, the United States will not be formally bound by the outcome of the trial. Nevertheless, in view of the enormity of the horror in the Lockerbie case, the US Congress also passed a special law allowing those who are victims of acts of international terrorism to sue the Government of any state that sponsors terrorism. Presumably this is why the charges contain the words "while the accused were acting as members of the Libyan security services".[5] Moreover armed guards escorted the accused, who have been held at the former US airforce base for more than a year.[6]

The Lockerbie case will not be trialed with a jury but by a panel of three judges. Before the International Court of Justice, Libya opposed the possibility of a jury trial, stated that the two could not receive a fair trial in the United States or in the United Kingdom. In this case, the panel of three judges instead of a jury was a concession to the Libyan arguments against a biased jury. Under the special provisions for the Lockerbie trial, the verdict will be taken by majority.

The Agreement between the United Kingdom and the Netherlands regulates the sitting of the Scottish Court in the Netherlands, and the matters arising out of the trial and the proper functioning of the Scottish Court. This Agreement is similar to other examples.

The status of the Scottish Court can be compared with the military courts of the NATO. The military courts may hold trials in the foreign state, and detain persons belonging to its own forces. The domestic authorities shall give any assistance sought by the foreign authorities. The position of the Scottish Court deviates from that of NATO military courts which jurisdiction is limited to their own forces, and may even relate to crimes committed in the host country.

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5 The Times, May 9, 2000.

6 The Times, May 4, 2000.

The position of the Scottish court is similar to the International Criminal Tribunal for the crimes committed in the former Yugoslavia. The creation of the *ad hoc* tribunals for the crimes committed in the former Yugoslavia opens the way for trial beyond state level and under certain circumstances, states must defer to these supranational institutions. In the Lockerbie case a foreign court has special legal position in another souvereign territory.

I agree with A. Klip and M. Mackarel that the establishment of a domestic criminal court sitting on an extraterritorial basis in this manner is unprecedented and can be viewed as another step in the pragmatic approach being adopted by the international legal community towards international and trans-national criminality. This bilateral treaty between the Netherlands and the United Kingdom is a new step in international co-operation in criminal matters. It must be considered as an *ad hoc* solution for a complicated political problem and should be welcomed in that respect. Like the transfer of proceedings and the transfer of the executions of judgments, it forms an alternative to the more traditional forms of co-operation, such as extradition and mutual legal assistance.[7]

III. Legal problems of the Lockerbie case

A. Klip and M. Mackarel assume that on a formal basis the two accused left Libya voluntarily. This is relevant in order to determine whether Libyan law was violated or not. Since Libyan law prohibits the extradition of nationals, only a voluntary decision by the accused to leave the country can circumvent that.[8] *I do not think* that one of the major questions is whether the two voluntarily boarded the plane. The suspects deny three charges of murder, conspiracy to murder and breaching a 1982 Civil Aviation Act. The defence lawyers announced that they would seek to exonerate their clients by incriminating others. They specifically named two terrorist organisations and also named ten individuals.[9]

Since the Judgement of the International Court of Justice in the Lockerbie case, it is clear that Security Council Resolutions shall prevail over other obligations. This means that the actual transfer should not have been dependent

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7 KLIP, A. and MACKAREL, M.: The Lockerbie trial—A Scottish Court in the Netherlands. *Revue International de Droit Pénal 3e et 4e trimestres 1999.* 817.

8 KLIP–MACKAREL: *op. cit.* 792.

9 The Times, May 4, 2000.

on a voluntary decision of the accused persons. Accordingly, in my opinion the Security Council Resolution 748 (1992) prevails over Libyan domestic law. In line with this reasoning Article 29 point 2 says that: States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to (e) the surrender or the transfer of the accused to the International Tribunal.[10]

I do not see any real legal problem of the next questions put forward by A. Klip and M. Mackarel: What was their status on board the United Nations aircraft? Must this also be considered as voluntary? Since the United Nations itself does not have any power to detain or to extradite persons, we must also assume that their presence aboard the aircraft was also voluntary.[11]

In my approach to these questions: if the ICJ stated that the Security Counsil Resolution shall prevail over other international obligations, the resolutions should have self-executive power. The UN Secretary General did not do anything else than to execute the resolution of the Security Council, when providing the UN aircraft for the transfer of accused persons. The UN participation in a given case is also a new element of the international co-operation in criminal matters.

It is a question whether the establishment of a Scottish Court in The Netherlands is the constitution of a special court for a single crime and for the two accused only. I agree with A. Klip and M. Mackarel that the Court cannot be regarded as a special one. The only thing which is special is the seat of the court and I do not think that the opposition of the Libyan Government against a jury trial should be relevant here.

It is a domestic legal problem whether a provision would be necessary as it already existed in Article 15 YTAA in connection with the Yugoslavian court: "The transit of persons who have been convicted by the Tribunal and in respect of whom a custodial sentence is to be enforced in a foreign State shall be conducted on the instructions of Our Minister by Dutch officials and under their guard. The said officials shall be empowered to take all appropriate measures for the security of the persons in question and to prevent their escape."[12]

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10 Annex of the Security Council Resolution 827/1993: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

11 KLIP–MACKAREL: *op. cit.* 792.

12 KLIP–MACKAREL: *op. cit.* 816.

IV. Crimes under international law trialed by national courts

The principle of individual criminal responsibility under international law—either customary or treaty—is not any longer disputed.[13] On the contrary, that is a debated issue whether national courts can be a proper forum for prosecuting crimes of international law. More generally: whether a national court is well qualified to enforce international law.

In Hungary the war crimes and the crimes against humanity committed during the World War II were punished by a provision with retroactive effect of national law. Such crime was punished by a foreign court as well. The Canadian High Court of Justice convicted a Hungarian national for deporting Jews during the war. This case shows that any state may exercise its jurisdiction over an individual found in its territory, irrespective of the place where the crime was committed when such offences can be categorized as crimes against humanity.

In Hungary we can see some unsuccessful attempts to investigate, prosecute and punish individuals for crimes against humanity, committed under past regimes. Some states enacted amnesty laws which have barred proceedings against the perpetrators of crimes against humanity. Customary international law neither prohibits such laws nor obligates other states to recognize their effects. Only international treaties lay down the obligation either to prosecute or extradite individuals who have committed certain offences of universal concern.[14]

The *Pinochet* case cannot be regarded as the prosecution of crimes committed during World War II or characterized as the new political regime wants to prosecute the offences committed during the past regime. The *Pinochet* case shows that it is possible to enforce the contemporary standards of international law by the interpretation of domestic statutes.

As it is well known, General Pinochet was arrested on the basis of two provisional arrest warrants issued by United Kingdom magistrates, at the request of Spanish courts, pursuant to the European Convention on Extradition.

One of the interpretations of the principle of double criminality in English law says that an extradition crime is an act that is criminal in both the requesting and the requested state. Since the murder of a British citizen by a non-British citizen outside the United Kingdom would not constitute an offence in respect

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13 BIANCHI, A.: Immunity versus Human Rights: The Pinochet Case. *European Journal of International Law*, 1999. Vol. 10. No. 2.) 238.

14 E.g. the Montreal Convention.

of which the UK could claim extraterritorial jurisdiction, the murder of Spanish citizens by non-Spanish citizens in Chile cannot be qualified as an extradition crime.

After clashing decisions of lower courts, a panel of seven Law Lords on 24 March 1999 rendered its decision on the case. By a majority of six to one, the House of Lords in the judgment held that General Pinochet was not immune for torture and conspiracy if these acts were committed after 8 December 1988 when the section 134 of the Criminal Justice Act 1988 implements the Torture Convention.

The question of which critical date is relevant for the double criminality principle was solved by requiring that the alleged conduct constituted an offence in both the requesting and the requested state at the date of the actual conduct.[15] Since torture only became an extraterritorial offence after the entry into force of section 134 of the Criminal Justice Act 1988, alleged acts of torture and conspiracies to commit torture outside the United Kingdom before that time did not constitute an offence under English law. Therefore, they could not be qualified as extradition crimes under the principles of double criminality.

Only Lord Millett maintained that English courts would have jurisdiction at common law over acts of torture from a much earlier date, when international law recognised that such acts could be prosecuted by any state on the basis of universal jurisdiction. He pointed out that the English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law including the systematic use of torture on a large scale and as an instrument of state policy which had already attained the status of an international crime of universal jurisdiction.

Eventually, Lord Millett yielded to the view of the majority and proceeded on the basis that Pinochet could not be extradited for acts of torture committed prior to the coming into force of section 134 of the Criminal Justice Act.[16]

In this part of the judgement the viewpoint of the majority of Lords was that statutory international law prevails both over customary international law and common law. I think Lord Millett's opinion harmonized with the conception of the next issue.

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15 For the purpose of double criminality US and Swiss law do not require that the relevant conduct be criminal in both the requesting and the requested state at the time the alleged crime was committed.

16 BIANCHI: *op. cit.* 244.

V. Immunity of the head of state

Most of the Law Lords formed the opinion that immunity of the head of state would simply be incompatible with the provisions of the Torture Convention, which clearly indicates the official or governmental character of torture as a constituent element of the crime.

Under customary international law there can be no immunity for crimes of international law. The exercise of extraterritorial jurisdiction over certain grave offences is permitted on the basis of the universality principle. However, if one characterizes the prohibition of torture as norms of *ius cogens,* that immunity can not co-exist with them. Since *ius cogens* norms enjoy the highest status within international law they prevail and invalidate other rules of international law.[17]

The human rights atrocities cannot be qualified as sovereign acts: international law cannot regard as sovereign those acts which are not merely a violation of it, but constitute an attack against its very foundation and predominant values.[18]

John Hopkins wrote: "The cases show remarkable and, as it appears, unprecedented willingness to rely upon provisions of international law, both conventional and customary, in domestic proceedings. The relationship between international and municipal law will be viewed very differently henceforth. In particular, the apparently ready acceptance by the majorities of the notion of *ius cogens* and of the provisions of the Torture Convention (and of certain other treaties) as instances of the *ius cogens* is perhaps surprising."[19]

However the decision in Pinochet case referred to the norms of *ius cogens*, it is disputed what norms qualify for the category of *ius cogens.* Genocide, apartheid, torture committed as a matter of state policy, murder, arbitrary detention and enforced disappearance of individuals can be included in the list. The category of *ius cogens* shows the values and interests which are regarded as fundamental by the international community as a whole. After the Pinochet case not only the world public opinion demands that violations of fundamental international obligations must be treated seriously. I think the legal interpretation of Law Lords is similar to the above mentioned ICJ decision when making hierarchy in international obligations.

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17 *Ibid.* 262.

18 *Ibid.* 265.

19 HOPKINS, J.: Case and Comment–Former head of foreign state–extradition–immunity. *The Cambridge Law Journal*, Vol. 58 Part 3 November 1999, 465.

Many principles, rules and doctrines of both international and domestic law are reminiscent of an old-fashioned and no longer viable approach to international law, which regards respect for the sovereignty of states as the fundamental value of the international system. Opposite this the "notion of individual accountability for crimes against humanity, the active role of municipal courts in the enforcement of international criminal law as well as the steady process of erosion of the foreign sovereign immunity doctrine are all elements which are hardly amenable within the traditional representation of the international legal system as a horizontally-organised community of sovereign and independent states."[20]

As a summary it can be stated that *the two cases show a new development in the field of crime prevention and criminal justice. The international co-operation in criminal matters generally will be based on the joint activities of sovereign and independent states in the future as well. Nevertheless, the new methods of this development might work against the national legal system of a given state, referring to the hierarchy that exists in the international legal order.*

20 BIANCHI: *op. cit.* 271.

ACTA JURIDICA HUNGARICA
2000 41 Nos 3-4, pp. 181-198

1216-2574 / 2000 / USD 5.00

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International Efforts Against Trafficking in Human Beings

1. Introduction

Following the *changing mentality*, the efforts to find a *common definition*, concerning trafficking in human beings, *focusing on the issue to harmonise the national and international legal measures,* legal instruments aiming at combating traffic in human beings, *we are witnessing* an important segment of *the process towards internationalisation and europeanization of criminal law and criminal justice.*

During the last decade, the scope of the trafficking in human beings (mostly women and girl-children) as a phenomenon *has increased world-wide.* Since the last 10–15 years, there is a greater attention in the post-communist countries directed to combat organised crime in general, including trafficking in human beings. These countries have become mostly countries of origins or transit, or to a less extent country of destination of trafficking activities.

Disregarding here and now the causes and conditions in sending, as in well as receiving countries and *focusing on the developments and weaknesses of national and international law and the shortcomings of established institutions in this field,* we are still facing with a *difficult task,* as there is a great deal of materials to analyse and to conclude its different levels and aspects. *There are a whole series of legally binding and legally not binding*—however very important—*documents in european and international level.* Some of them are focusing

on human rights, some on *migration, on labour*, on *combat organised crime* and/or *specifically on trafficking issues*. To evaluate, whether or not trafficking is addressed adequately, it is necessary to combine and use all of these approaches.

Trafficking is a *serious* and *multipled human rights violation*, infringing a person's *human dignity, personal liberty, freedom of movement, privacy,* and *self-determination.* It furthermore violates the *prohibition of slavery*, slavery-like practices and *compulsory work* as well as trafficking in human beings is to *be equated with cruel and inhuman treatment.* All mentioned areas are basic principles of the most important human rights documents, like the *Universal Declaration of Human Rights (1948) or the International Covenant on Civil and Political Rights (1966).* It would be very long even to mention the list of all relevant international documents. Here and now, I would only focus on, that "women and children are particularly vulnerable to becoming victims of the crime of illegal trafficking in and transporting of migrants".[1]

All States should take all appropriate measures on national, bilateral and multilateral level, to prevent the abduction of, the sale of, or traffic in children for any purpose and in any form of sexual exploitation, or abuse of children, including within the family, or for commercial purposes, child pornography and child prostitution, and through child sex tourism, taking into account the particular problems, posed by the use of Internet, in this regard, and to protect children from these practices, in accordance with the provisions of the Convention on the Rights of the Child and taking into account the concrete measures outlined in the Vienna Declaration and Programme of Action and in the Programme of Action adopted by the Commission in 1992, 1993 and 1996.[2]

It is very hard to find an *exact and equally accepted definition* of trafficking in women, as there are various perspectives. Besides the *element* of *exploitation*, some definitions place the emphasis on the element of *border-crossing,* some on the element of *forced* prostitution, on *debt bondage*, or *slavery-like practices*, etc. Recently, definitions given by NGOs are not any more limited to trans-border trafficking, nor to trafficking of women for the purpose of prostitution. These definitions are also *involving labour in slavery-like conditions, domestic-labour, forced marriages* etc. and focus on the *isolation* and exploitation of the victims, experiencing multiple *violations of their rights.*

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1 ECOSOC Res. 1998/19 Action against illegal trafficking in migrants, including by sea.

2 Commission on Human Rights Resolution 1999/80 on Right of the Child. Prevention and eradication of the sale of children and of their sexual exploitation and abuse, including child prostitution and child pornography.

The world-wide phenomenon of trafficking in women for prostitution between European countries is going on, in several way. Whereas some women are openly and explicitly recruited as prostitutes and decide voluntarily to work in the sex sector, others are forced into prostitution by use of violence, or mislead by false promises, hired as waitresses or baby-sitters. Trafficking happens occasionally as well as in organised forms. *Criminal networks involved in this business have different levels of organization (large-scale, medium-scale and small-scale network), realising huge profits, while facing only low risks.*

This phenomenon's *form, organization, structure* is continuously and dynamically *changing* and its extension is increasing dramatically. In spite of efforts been taken to discover its scope, there are only fragmentary data and estimations on the number of women—especially foreign women—involved in prostitution.

Relevant changes have occurred, including the *origin* and *destination* of women involved. In general, *labour migration is directed towards Europe*, towards *development* and *better living conditions*. Besides changes in ways and routes, there have also occurred *structural changes* over the recent years. These structural changes are influenced by *increasing sex-tourism, economically-motivated migration, new technologies, the concentration of soldiers in conflict-zones*, etc.

The sex-industry is continously *moving into new territories*, where *economic* and *social* circumstances *have created favourable conditions for its business activities.* The recruitment of women for the purpose of prostitution usually happens *under the facade of legal, or semi-legal activities.* Its attractiveness lies in the expectancy of promised large income. The real income of a commercial sex worker, however, is trivial, compared with the profit realised by those organizations, involved in this business (travel agencies, hotels, bars, airlines, pimps, etc.).

The money, originating from the exploitation of prostitution, gets into the business life, *laundered* in different ways. *In those systems, where prostitution and its management are legalised professions, this phenomenon is also true inversely, namely, that the money, originating from drug-dealing or weapon-trade can be laundered by getting into the sex-business.*

Foreign women involved in forced prostitution belong to a desperately isolated and manipulated group in society, suffering from several psychical and physical diseases. Being threatened and ill-treated by their traffickers in various manners, their human rights are permanently and seriously violated. Nearly all of these women are held in debt-bondage; as soon as they sign a contract amounting to high debts (for travelling cost, lodging etc.), they are

very dependent on their "protectors", in social as well as in economic meaning. Sometimes they are *staying illegally* in the foreign destination country, *without valid travel documents* or even no documents at all. As a consequence, they do not seek the assistance of the authorities, but they avoid any contact with them. As they have no residence permit, they are facing the risk to be expelled from the country. The v*ery strict control practised by the traffickers over the women and their illegal status or the involvement of other illegal activity, constitute an obstacle in approaching and helping the foreign victims of trafficking.*

Women involved in voluntary[3] or forced prostitution are more or less stigmatized in every system (prohibitionist, abolitionist or reglementary). *The licensing system of voluntary prostitution sometimes subjects sex-workers to the state's taxation system*, but does not always include them into the system of labour law standards, or social security. Moreover, it does not eliminate the stigmatization experienced by prostitutes.

Among the most important factors of prevention of forced prostitution, I would like to stress the necessity of *better information for potential migrants*, of promoting *women's economic independence*, of *co-operation between European countries to* combat forced prostitution and to *support the reintegration of victims into society.*

2. International Legal Framework

2.1. International Documents Against Trafficking

A) There was a long time and procedure—started in 1904, resulted in several international conventions—while the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others*[4] *was adopted.* This was "the first international agreement, to conceive of trafficking in gender-neutral terms, and to consider the problem of exploitative prostitution as a matter of international law, rather than strictly an issue of domestic jurisdiction".[5]

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3 According to some authors there is not voluntary prostitution as such, while some kind of force, including the economic one, is always existing.

4 1949. New York, UN Res. 317 (IV) 2 of Dec. 1949.

5 KNAUS, K.—KARTUSCH, A.—REITER, G.: Combat of Trafficking in Women for the Purpose of Forced Prostitution. International Standards Published by the Ludwig Boltzmann Institute of Human Rights, Vienna, 2000. 19.

According to the Convention the State parties "agree to punish any person who, to gratify the passion of another: (1.) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2.) Exploits the prostitution of another person, even with the consent of that person.[6] Furthermore the states agree to punish any person who: (1.) Keeps or manages, or knowingly finances, or takes part in the financing of a brothel; (2.) Knowingly lets or rents a building or other place, or any part thereof, for the purpose of the prostitution of others.[7]

The Convention *prohibits the exploitation of prostitution by others*, however does not ban prostitution itself, in spite of the fact, that in its preamble declares: "prostitution and the accompanying evil, of traffic in persons for the purpose of prostitution, are incompatible with the dignity and worth of the human person, and endanger the welfare of the individual, the family and the community".

The Convention *does not give a precise definition of trafficking*, but it is clear, that it does not cover the trafficking activities for purpose, other than prostitution (like forced domestic or industrial labour, forced marriage etc). It *does not differentiate* –expressis verbis– between *voluntary* and *forced prostitution*, but its language and philosophy expressing the view, that prostitutes are regarded as victims. This is evident in particular from the content of the Article 6.[8]

The offences, referred to in article 1. and 2. of the Convention, shall be regarded as *extraditable offences. Extradition* shall be granted, according to the law of the State, to which the request is made. In States, *where the extradition of nationals is not permitted by law*, nationals who have returned to their own states, after committing the referred crime, shall be prosecuted in and punished by the courts of their own State.[9]

The enforcement and monitoring mechanism of the Convention is elaborated, but not functioning adequately in the practice. Since *1974, the State parties are required to submit reports regarding slavery and trafficking to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.*[10]

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6 Art. 1.

7 Art 2.

8 Each Party to the present Convention agrees to take all the necessary measures to repeal or abolish any existing law, regulation or administrative provision by virtue of which persons, who engage in, or are suspected of engaging in prostitution, are subject either to special registration or to the possession of a special document or to any exceptional requirements, for supervision or notification.

9 Article 6, 8.

10 See KNAUS–KARTUSCH–REITER: *op. cit.* 21.

It is missing however an *independent body to supervise and monitor* the implementation of the Convention.

B) Besides the Trafficking Convention (which was ratified by 72 states), the CEDAW and the CRC (Convention on the Rights of the Child, 1990) also address, in an explicit manner the issue of trafficking.

The CEDAW is an international convention on non-discrimination, obliging State parties to provide conditions and remove obstacles, making possible for women to exercise their human rights. It is implicitly obliging the governments to take all appropriate measures, *including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.*

The wording is mirroring a broader concept of trafficking; including trafficking in women, not only for the purpose of forced prostitution, but other slavery-like practices, too. This content is more precisely enlightened by the General Recommendation No. 19. of the CEDAW Committee,[11] on Violence Against Women *explicitly enlisting domestic labour and organised marriages in addition to established forms of trafficking.*

The reason of applying for a the broader definition, in depth interpretation of trafficking is, that these kinds of practices are not only preventing women in equal enjoyment of their rights, but denying their human rights and dignity, moreover running the risk of practicing abuse and violence against them.

According to Art. 18. of the CEDAW, the State parties are required to submit reports on measures taken by them, in the interest, to implement the provisions laid down in the Convention. Most of the countries are regularly fulfilling their reporting obligation, even if there are some overdue reports.

Universal ratification of the Convention had not been achieved till now, *(there are 165 State parties).* A significant achievement in implementation of the Optional Protocol to the Convention (adopted by the General Assembly at its fifty-fourth session in 1999) however can be seen. Forty-three State parties to the Convention have signed the Optional Protocol, and five have submitted instruments of ratification and accession. A further five ratifications are requred before the Optional Protocol enters into force.[12] The Optional Protocol to the Convention is granting individuals and groups of women who have exhausted domestic remedies–the right to submit petitions alleging violations of the Convention, to the CEDAW Committee. *"The Committee can perform the inquiry procedure, if it has reliable information on grave systematic violations*

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11 Committee on the Elimination of Discrimination Against Women.

12 Statement at the 11th Meeting of the State parties to the CEDAW, New York, 31. Aug. 2000.

of the provisions of CEDAW committed by a state party. The application of both procedures requires, that the state concerned, is a party to both CEDAW and its optional protocol".[13]

C) The Convention on the Right of the Child[14] in *several articles* contains provisions on *protection of the children,* among others from abuse, violence, maltreatrnent, exploitation, including sexual violence, too.

In *Article 34.* of the Convention, protection of child, from all forms of sexual exploitation and sexual abuse is declared. State parties in particular shall take all appropriate measures on national, bilateral and multilateral level to prevent:

inducement or coercion of a child to engage in any *unlawful sexual activity,*

exploitative use of children in *prostitution or other unlawful sexual practices,*

exploitative use of children in *pornographic performances or materials.*

The provision of *Article 35.* is binding the State parties to prevent the abduction of, the *sale, traffic in children for any* purpose or in any form.

The monitoring mechanism of this, the implementation of the rights, according to the Convention—similarly to the CEDAW—is the regular state-reporting procedure (periodic reports).

2.2. Documents Against Slavery

Besides the above mentioned specific conventions on trafficking, there are documents, approaching the problem from human rights aspects.

A) The *Universal Declaration of Human Rights,*[15] is categorically stating in its Art. 4. : "no one shall be held in slavery or servitude, slavery and slave trade shall be prohibited in all their forms."

B) The *UN Slavery Convention,*[16] in its Art. 6. obliges State parties, to completely abolish slavery and slavery-like conditions in all its forms. Slavery means the status or condition of a person, over whom any or all of the powers,

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13 The State however may declare not to recognise the competence of the Committee in carrying on an inquiry procedure ("opting out").

14 UN GA Res. 44/25 of 20 Nov. 1989 (entry into force on 2 Sept. 1990).

15 UN GA Res 217 A (III) of 10 Dec. 1948.

16 25 Sept. 1926 entry into force 9 March, 1927; amended by Protocol UN GA Res 794 (VIII) of 23 Oct. 1953.

attaching to right of ownership are exercised (Art. 1. § 1). This definition of slavery is very limited, very narrow and does not cover all kinds of violations. In 1956, the Supplementary Convention on the Abolition of Slavery, Slave Trade, and Intitutions and Practices Similar to Slavery[17] was adopted, which aims to eliminate slavery-like conditions and abolition, abandonment of debt bondage.

C) *The Resolution of the UN Working Group on Contemporary Forms of Slavery*[18] in 1974, was expressing the view, that the trade of women is a new way of slavery. Trafficking in women and children is recognised as a form of slavery, which means, that anti-slavery treaties also cover efforts against trafficking.

D) *The International Covenant on Civil and Political Rights (ICCPR) in* 1966, according the Art. 8 is declaring: "no one shall be held in slavery: slavery and slave trade, in all their forms shall be prohibited". The State parties are obliged, to submit reports to the UN Human Rights Committee on the implementation of the Covenant. The Optional Protocol at the same time enables individuals (from the State parties) to submit complains, concerning their human rights violations to the Committee, if domestic remedies are already exhausted.

2.3. Documents Against Forced Labour

The third field – which is providing some remedies in the case of non-voluntary work, exploitation of children in labour sector – is the regulation of the world of labour. These Conventions are providing protection of human rights in case of trafficking in women, too.

I should mention among others the ILO Conventions: Convention concerning Forced Labour (1930), Convention concerning Abolition of Forced Labour (1957), as well as Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999). According to the Art. 34 of the Convention on Abolition of Forced Labor, the State Parties – in particular – shall take all appropriate measures on national, bilateral and multilateral level, to prevent:

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17 7 of Sept. 1956, entry into force on 30 April 1957.

18 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities.

- inducement or coercion of a child to engage in any unlawful sexual activity,
- exploitative use of children in prostitution or other unlawful sexual practices,
- exploitative use of children in pornographic performances or materials.

The provision of Article 35. is binding the state parties, to prevent abduction of, the sale, traffic in children for any purpose or in any form. The monitoring mechanism of the implementation of the rights—according to the Convention –is the regular state-reporting procedure, the so-called periodic reports.

2.4. Other Human Rights Documents

There are several further human rights documents, which are addressing trafficking in women and forced prostitution, as human rights violations, violence against women as gender-based violence. These declarations, platform for actions are not-binding documents, however expressing basic values, consensus of the international community in certain fields, and in such a way, contributing to the chrystallisation of the main principles, emerging common policies and measures. I would mention and refer here, as an example, to the World Conference on Human Rights (1993, Vienna), the UN Declaration on the Elimination of Violence against Women (1993) and the Fourth UN World Conference on Women in Beijing (1995).

3. Trafficking in persons, as crimes against humanity (and as war crime)

According to the *Geneva Conventions* concerning protection of civilians, victims etc. in the time of war and armed conflicts, acts of torture or inhuman treatment, as well as willfully causing great suffering, serious injury of body or health, is constituting a grave violation of the provisions laid down in these Conventions. The Fourth Geneva Convention on the Protection of Civilian Persons in Time of War[19] in Art. 27, para 4. requires protection of women against rape, enforced prostitution, or any form of indecent assault.

In the provisions of the *Rome Statute of the International Criminal Court (ICC)* "rape sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity.[20]

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19 12 Aug. 1949, entry into force 21 Oct 1960.

20 Rome Statute of the International Criminal Court, Rome, 15 June–17 July, 1998. Art. 7.

Trafficking in persons, in particular women and children (as enslavement), included to the list of crimes against humanity.[21] In periods of armed conflict, acts of forced prostitution and trafficking in persons can be prosecuted as war crimes. (Art. 8 para 2, subpara XXII.) The Court shall have jurisdiction in respect of war crimes, in particular when it is committed as a part of plan, or policy or as a large-scale commission of such crimes.

4. Efforts of the Council of Europe, European Parliament, European Union Against Trafficking in Human Beings

4. 1. Council of Europe

The most important human rights document in Europe is the *European Convention of Human Rights (ECHR)*, which was ratified by all the member states of the Council of Europe.

The Convention does not contain provision, concerning prohibition of trafficking in persons, however the provisions against slavery, servitude, compulsory labour[22] as well as banning torture, inhuman or degrading treatment or punishment[23] is regarded as applicable, in case of trafficking in women and forced prostitution.

In *1991, a group of specialists was formed by the Steering Committee for Equality between Women and Men (CDEG),* with the task to draw up proposals for action to combat trafficking. I had the honour to work in this group during its two years activity. On the basis of the final document, produced by this group, 1993, a Plan of Action Against Traffic in Women and Forced Prostitution was elaborated by Michele Hirsch, (in 1996) among others giving a definition of trafficking in women as follows: " when a women is exploited in a country other than her own, by another person (natural or legal) for financial gain; the traffic consisting of organising (the stay or) the legal or illegal emigration of women, even with her consent, from her country of origin to the country of destination and luring her by whatever means into prostitution or any form of sexual exploitation."

The Action Plan and the definition, arised great discussions and remained as a continous debate on the agenda of public discussions, up until today.

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21 Art. 7. para 2.
22 Art. 4.
23 Art. 3.

The Council of Europe had several other initiatives in this field, like drafting different *recommendations* to the Council of Ministers, or organising various international seminars for experts and NGOs. The recent event was, the *elaboration of regional action plan in South Eastern Europe* on the basis of an international seminar, held in Athen, 29 June–1 of July, 2000.

4.2. European Union

The European Union also has several documents and efforts to deal with the problem of trafficking. The *Treaty of Amsterdam* requires cooperation in police and judicial matters in criminal cases, to combat organised crime more effectively. The *Europol* (European Police Office) has a significant role in prevention and fight against internationally organised crime, in particular concerning illicit drug trafficking, radioactive and nuclear substances, crimes involving clandestine immigration networks, illegal vehicle trafficking, trafficking in human beings, illegal money-laundering activities, connected these crimes.

The Europol is facilitating the exchange of information and data, promoting awareness of analysis on crime and harmonisation of analytical methods. It keeps contact between the national police forces in an informal, quick and non-bureaucratic basis.

4.3. European Parliament

There are *several,* very important *European Parlament resolutions* –like the *Resolution on the Exploitation of Prostitution and the Traffic in Human Beings* (1989) or the *Resolution on Trade in Women* (1993) –addressing adequately the problem of trafficking. The lattest is calling for international cooperation and improvement of the victims' position.

The European Conference on Trafficking in Women for the Purpose of Sexual Exploitation, was held in Vienna In *1996.* It resulted in a Communication of the European Commission on Trafficking in Women for the Purpose of Sexual Exploitation.

In *1997, an EU Ministerial Conference was held in The Hague,* on the question of trafficking in women for the purpose of sexual exploitation, and the *Basic Principle for the Code of Conduct* were drafted.

It would be possible to continue the long list of these initiatives, I would only refer however to the *Report of the European Parliament on the Communication from the Commission to the Council and the European Parliament* "For further actions in the fight against trafficking in women (Rapporteur: Patsy Sörensen).

This is a very important report, from which I would stress here and now only the next (point 9.):

"Calls on the Commission, (further to the poor implementation of the 1997 Joint Action and in line with the conclusions of Tampere), to make specific proposals towards the harmonisation of national laws and methods of detection and prosecution, with a view to ensuring

- crime is categorised in the same way in all Member States,
- effective, proportional and dissuasive sanctions against traffickers,
- *extraterritoriality jurisdiction and extradition for the crime of trafficking in human beings,*
- *seizure of the proceeds of criminal activities and legal* scope for compensation and reparations for victims for the financial, physical and psychological harm they have suffered,
- *non-criminalisation of trafficked persons*, including non-criminalisation for the use of forged visas or documents, made as a result of their ordeal, together with a ban on any form of internment of victims in detention centres,
- measures to *protect victims and witnesses*, and the families of witnesses, not least in the country of origin and guaranteed safety for women, acting as witnesses or wishing to testify,
- the possibility for NGOs, to bring court actions on behalf of the victim,
- the reversal of the burden of proof in court actions on trafficking charges, so, that it rests with the alleged trafficker, in a way that complies with national constitutions;

that the circumstances of victims of trafficking should not constitute grounds for an investigation of their background or of public or private documents, and can, in no event be used against them, their families or their close relations, particularly when they freely exercise their rights, as regards freedom of movement,

– establishment and seeking gainful employment;

– strict confidentiality in medical and psychological tests, which may be conducted only at the request of the person concerned, and must be preceeded and followed by proper counselling;

an analysis of trafficking and the existing instruments for combating it, including specific data and estimates-number, origin, age and sex of persons involved, comparison of criminal law;

a detailed examination of the difficulties, encountered in identifying and dismantling networks and detecting any links between different mafia organisations;

– a specific evaluation of police cooperation and cooperation with non-member countries, in particular candidate countries, and an overview of arrangements for victim support;

– an estimate of the budgetary resources required to implement the support measures required at European Union level."

5. Counter-trafficking legislation in Hungary

In 1999, an amendment[24] has been introduced into the Hungarian Criminal Code, penalising trafficking in human beings, as new form of crimes against personal freedom and human dignity. Relevant provisions within this new chapter are the nexts: Sect. 175 (Violation of personal freedom), Sect. 175/A (Kidnapping) and Sect. 175/B (Trafficking in human beings).

Under Sect. 175 para 1, it is penalised up to 3 years loss of liberty, if someone violates the personal freedom of another person. According to para. 2, that behaviour is penalised from 2 to 8 years loss of liberty, if someone acquires another person in connection with trafficking, keeping the victim in deprivation of liberty and forced labour. Para. 3, is penalising the act, regulated in para. 1. with 5 years and in para 2. from 5 to 10 years loss of liberty, when it is committed a) for a malicious motive or purpose, b) by feigning official action, c) by tormenting the aggrieved party, d) causing a significant injury of interest, or e) against a person under the age of eighteen.

Trafficking in human beings: Sect. 175/B[25]

(1) Any person who sells, purchases, conveys or receives another person or exchanges a person for another person, or appropriates one for such purpose for another party, commits a felony and shall be punishable with imprisonment of up to three years.

(2) The punishment shall be imprisonment from one to five years if the criminal act is committed

a) against a person, deprived of personal freedom,
b) against a person under the age of eighteen,
c) for the purpose of forced labour,
d) for the purpose of fornication or sexual intercourse, or to involuntarily engage in such with another person.

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24 Act. LXXXVII. of 1998, entered into force on the 1 of March, 1999.

25 Non-official translation.

(3) The punishment shall be imprisonment from two to eight years if the criminal act

a) involves two of the aggravating circumstances described in Subsection (2),
b) is committed, as part of a criminal organisation,
c) is committed against a person under the education, guardianship, supervision or medical treatment of the perpetrator.

(4) The punishment shall be imprisonment from five to ten years if the criminal act

a) involves three of the aggravated circumstances described in Subsection (2),
b) is committed against a person deprived of personal freedom, as part of a criminal organisation,
c) is committed against a person under the education, guardianship, supervision or medical treatment of the perpetrator, and deprived of personal freedom.

(5) The punishment shall be imprisonment from ten to fifteen years or for life, if the criminal act is committed for the purpose of forced labour and fornication or sexual intercourse, or to involuntarily engage in such with another person,

a) against a person deprived of personal freedom, as part of a criminal organisation,
b) against a person under the education, guardianship, supervision or medical treatment of the perpetrator, and deprived of personal freedom.

(6) Any person making preparations to engage in trafficking in human beings commits a misdemeanour and shall punishable with imprisonment of up to two years.

The prohibition of trafficking in persons is a very modern regulation, containing all forms of trafficking activity: for *purposes of forced labour* as well *as for sexual exploitation.* It is a very progressive step, that Hungary regulated trafficking in persons as a special crime in a detailed manner, *sanctioning more severely among others the victimization of minors or the deprivation of freedom of victims.*

The legislator *doesn't differentiate explicitly between trans-border and inland trafficking activities.* On the one hand, this is a very positive and important decision, based on a broad definition of trafficking, expressing the view that *the legislator doesn't tolerate any kind of slavery or slavery-like*

practices. On the other hand, in my opinion the *element of trans-border trafficking* is of great relevance for the victim, who is more vulnerable in a foreign country, where she doesn't speak the language, doesn't know the customs, the culture, the administrative system, etc. Consequently, the trans-*border element should be included into the qualifying* circumstances of the crime, during the pending re-codification process.

The amendment of the Criminal Code on trafficking in persons entered into force on 1 March 1999.

Prostitution, prostitution-related crimes

Since 1993 prostitution does not constitute a crime, as according to an amendment of the Hungarian Criminal Code, the Sect. 204 on prohibiting prostitution, has ceased to have effect from 15 May 1993. After that, prostitution itself has not constituted a crime any more, it is only contravention, sanctioned with a fine.

Exploitation of the prostitution of others however is a criminal offence and severely penalised in the Hungarian Criminal Code: promotion of prostitution (Sect. 205), living on earnings of a prostitute (Sect. 206) and pandering (Sect. 207).

Promotion of Prostitution Sect. 205.

(1) The person who makes available a building or any other place for prostitution to another person, commits a felony and shall be punishable with imprisonment of up to three years.

(2) The person who maintains, heads a brothel, or makes available financial means to the functioning thereof, commits a felony and shall be punishable with imprisonment of up to five years.

(3) The punishment shall be imprisonment from two years to eight years, if

a.) any person who has not yet completed his eighteenth year, engages in prostitution in the brothel,

b.) prostitution is promoted as part of a criminal organisation.

(4) The person who persuades another person to engage in prostitution, shall be punishable in accordance with subsection (1).

Living on Earnings of Prostitution Sect. 206.

The person who lives wholly or in part on the earnings of a person engaging in prostitution, commits a felony, and shall be punishable with imprisonment of up to three years. Banishment may also take place as a supplementary punishment.

Pandering Sect. 207.

(1) The person who solicits another person for sexual intercourse or fornication for somebody else in order to make profit, commits a felony, and shall be punishable with imprisonment of up to three years.

(2) The punishment shall be imprisonment form one year to five years, if the procuring is business-like.

(3) The punishment shall be imprisonment from two years to eight years, if the procuring is committed

a) to the injury of a relative of the perpetrator or of a person under his education, supervision or care or who has not yet completed his/her eighteenth year of age,
b) with deceit, violence or direct menace against life or limbs,
c) as part of a criminal organisation.

(4) The person, who agrees on the perpetration of pandering defined in subsection (2) commits a felony and shall be punishable with imprisonment of up to three years.

As mentioned before, Sect. 204 of the Criminal Code penalising prostitution was abrogated in 1993. The exploitation of prostitution of others, however, remained a crime. Therefore it was necessary to give a definition of prostitution, as follows.

Prostitution Sect. 210/A:

"(1) Prostitution is pursued by the person who has sexual intercourse or fornicates striving to make regular profit.

(2) For the purposes of this title, fornication is: any gravely indecent act, with the exception of sexual intercourse, which serves the stimulation or satisfaction of sexual desire."

In the last years, continous efforts have been made to elaborate a system, which is able to prevent and control prostitution without violating the rules of the 1949 Convention on the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others. The result was a new law based on a *so-called limited abolitionist concept. According to this, there are protected zones (zones of prohibition), where prostitution is not allowed, and zones of tolerance to be created by the local governments, in cases, when prostitution massively appears.* The assignment of such locations cannot be neglected, if prostitution dominantly appears in public places and the settlement has more than 50.000 inhabitants.

Prostitutes as well as clients are prohibited from offering or accepting sexual services in the protected zones. Furthermore, the offering of sexual services to persons under 18 years, the accepting of offers of such person and the offering services in a way offending other people is forbidden. The advertisement of sexual services (and taking part therein) by written form, audio-visual or other means in protected zones is forbidden, too. All of the above mentioned violations of law are contraventions, belonging to police competence.

Health control of prostitutes is regulated in the order No.41/1999 (IX. 8.) of the Minister of Health Affairs. According to this, a prostitute can offer sexual services only, if she is possessing the prescribed medical certificate, which is valid together with her identity card. The medical examination should be initiated by the prostitute herself. It is not free of charge and should be repeated every month, or once in three months, depending on the kind of examination. From September, until the end of November 1999, only 12 prostitutes have initiated the medical examination.

Concerning prostitution, *there are still not existing the so-called "zones of tolerance"* as most of the local governments are *reluctant to create such zones* on their own territory. It *is also not elaborated, by whom and how it is possible to built the infrastructure of such zones.*

These uncertainties contributed to the fact, that *on the one hand,* the former structure of the street-prostitution changed and *on the other hand,* some of *the prostitutes were trafficked for foreign countries.*

6. Conclusions

Trafficking in women for sexual exploitation is becoming a more and more grave problem in Europe, exceeding national borders. Besides women, trafficked to Europe from South-East Asia, Latin America and Africa, there has been an increase in trafficking inside Europe since 1990. There is a flow of women from CEECs to EU countries ("East to West trafficking"), mostly following the regulatory system of prostitution, where a permanent need for exotic beauties, working in the sex-sector exists. Traffickers seek to meet this demand in the cheapest way– the recruitment of women from CEECs is less expensive and less risky, than importing women from other continents (minimal travel expenses, missing or mild visa requirements).

Other trafficking activities are taking place within CEECs ("East to East trafficking"): countries with better economies (mainly Hungary, the Czech Republic and Poland) have become countries of destination for others with less

favourable conditions. The above mentioned countries are also transit countries, serving as "entrance halls" to Western Europe. Increasing trafficking in persons from Romania, Russia, Ukraine to Hungary and from Hungary to Western Europe (Belgium, Italy, the Netherlands, Germany, Austria) and outside Europe has to be noticed. Hungary is regarded as a country of origin, of transit and of destination for trafficking in women.

Trafficking happens occasionally, as well as in organised forms. Organised criminal networks realise huge profits from trafficking in women, while these activities face only low risks. Highly organised international criminal networks are the most difficult to combat. Therefore, initiatives should be developed in Europe to be able to effectively combat this type of organised crime.

The Hungarian legislation has adequately recognised the situation, and very recently, considerable steps have been taken. The regulation of prostitution in a "limited abolitionist" manner, aimed to combat organised crime and deliberation of prostitution from exploitation, didn't proove fully successful. The regulation of trafficking in persons as a crime, with severe punishment as well as the violations of personal freedom, in connection with trafficking in human beings, however are to be regarded as very important tools of criminal law in the fight against sexual exploitation and slavery–like practices.

ACTA JURIDICA HUNGARICA
2000 41 Nos 3-4, pp. 199-212

1216-2574 / 2000 / USD 5.00

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European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law

Professor *Lahti* concludes his article by pointing to the limits and weaknesses of a European criminal policy, especially measured by the criteria of coherence and rationality. European criminal policy is incoherent, indeed, as it is not based on a sound concept of criminal law, but is rather the result of an *ad hoc* evolution guided by the strive for effectiveness of Community law.

After several decades of system building and formulation of regulatory programs, the implementation and enforcement of Community law has become a priority on the political agenda of the European Union.[1] Since sanctions—and particularly penal sanctions—are essential instruments to attain effectiveness of law, European criminal policy emerged in the context of the enforcement debate.

I. The interaction of Community law and national criminal law

Criminal law and criminal procedure are regarded as parts of the Member States' national sovereignty. Hence, the relationship between Community law and national criminal law has been characterised throughout several decades by

1 VERVAELE, J. A. E.: Transnational Cooperation of Enforcement Authorities in the Community Area, in: *Compliance and Enforcement of European Community Law* (ed.: J. A. E. Vervaele), The Hague—London–Boston, 1999, 361.

mutual disinterest. The general opinion was that since Member States did not transfer expressly sovereign rights in the field of criminal justice on the institutions of the Community, the latter cannot have its own system of criminal law.[2]

The era of disinterest ended with the establishment of the internal market and the opening of the Eastern European countries. The latter resulted in changed developments of crime. New main focuses of economic crime marked a tendency that with the facilitation of mobility and the lack of border controls in the internal market, more and more affected the European citizens. In some fields organised transborder crime can already be clearly perceived, in particular in drug trafficking, terrorism, subsidy fraud, car theft, large scale prostitution. Criminal law and policy and criminal prosecution had to, therefore, increase their efforts to take this development into account.

As a result, Community law ventured into areas such as insider dealing, money laundering, the manufacture of drugs, the acquisition and possession of weapons and the export of cultural goods, that used to belong to the exclusive competence of the Member States. Expanding the scope of the Community's activities, of course, increased the need for effective law enforcement.

The interaction between European Community law and national criminal law intensified during the last decades based on a functional *spill over*.[3] According to the latter, Community law encroached upon national criminal law only to the extent as the supremacy of Community law required it. In the spirit of supremacy, the ECJ used the fundamental rights enshrined in the EC Treaty to put domestic criminal law provisions out of effect as inproportional (i.e. too severe) or declared them inapplicable (i.e. violating e.g. the right to free movement of persons).[4] This primarily *neutralisation effect* was supplemented at the end of the 1980's by a positive obligation upon the Member States to ensure that infringements of Community law are penalised under conditions which are analogous to the conditions under which similar infringements of

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2 TIEDEMANN, K.: Europäisches Gemeinschaftsrecht und Strafrecht, *New Juristische Wochenschrift*, 1993, 23, 25.

3 See details on the concept of functional *spill-over* by TONRA: The Politics of Justice, in: *Justice Cooperation in the European Union* (ed.: Barett), Dublin, 1997, 50.

4 See details on the neutralising effect of Community law on national criminal law in: HEISE, F. N.: *Europäisches Gemeinschaftsrecht und nationales Strafrecht*, Bielefeld, 1998.

national law are punished.[5] This is also known as the *assimilation principle* which has been codified in Article 209A of the Treaty.[6]

The evolution of European criminal policy has not yet come to an end. Due to the limited scope of the present seminar, the author choose to reflect upon only the sanctioning aspect of European criminal policy, in particularly on the shifting boundaries between administrative and penal sanctions.

II. The enforcement deficit of the Community

The necessity to strengthen law enforcement in the Member States by the help of criminal law was impeded by the Communities' lack of competence in this field. It is generally accepted that the Community does not have the competence to set supranational criminal law since no such transfer of sovereign rights had taken place.[7] This is the result of the will of the contracting Member State and it is reflected in the interpretation of the Treaty.[8] From the jurisprudence of the ECJ it has become evident that it was

> [t]he intention of the drafters of the Community treaties that European Community law is a community of law without a criminal law[9] [and that]

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5 Case C-68/88 Commission v. Greece [1989] ECR 2965, see also case C-7/90 Vandevenne [1991] ECR I-4371; case C-36/94 Siesse [1995] ECR I-3573.

6 Art. 280 in the new consolidated version.

7 SIEBER, U.: Europäische Einigung und Europäisches Strafrecht, *Zeitschrift für die gesamte Strafrechtswissenschaft,* vol. 103, 1991, 970; TIEDEMANN, K.: Reform des Sanktionswesens auf dem Gebiete des Agrarmarktes der Europäischen Wirtschaftgemeinschaft, in: *Festschrift für Pfeiffer,* 1988, 113; WINKLER, R.: *Die Rechtsnatur der Geldbuße in Wettbewerbsrecht der Europäischen Wirtschaftsgemeinschaft,* Tübingen, 1971, 84; DANNECKER, G.: Strafrecht der Europäischen Gemeinschaft, in: ESER, A.–HUBER, B.: *Strafrechtsentwicklung in Europa,* Freiburg in Breisgau, 1995; BRIDGE, J. W.: The European Communities and the Criminal Law, *Criminal Law Review,* 1976, 88; OEHLER, D.: Fragen zum Strafrecht der Europäischen Gemeinschaft, in: *Festschrift für H. Jescheck zum 70. Geburtstag* (ed. T. Vogler), 1985, 1403, ZULEEG, M.: Der Beitrag des Strafrechts zur Europäischen Integration, in: SIEBER, U.: *Europäische Einigung und Europäisches Strafrecht,* 1993, 41.

8 DEN BOER, M.: Europe and the Art of International Police Co-operation: Free Fall or Measured Scenario?, in: *Legal Issues of the Maastricht Treaty* (ed. D. O'Keeffe and P. M. Twomey), Oxford, 1994, 285.

9 Case C-203/80 Casati (Guerrino), (Criminal Proceedings Against) [1981] ECR 2595, [1982] 1 CMLR 365, 2618.

the enforcement of law through the criminal law, has been left exclusively to the member states.[10]

This constraint inheres in the constitutional foundations of the Community. The latter may exercise only those powers that can be derived from the Treaties creating it. Thus, the Community is not empowered to issue rules binding upon the Member States without an express legal basis in the constitutive treaties.

This lead to a sharp institutional division within the European framework between administrative law and criminal law as tools of enforcement.[11] Administrative sanctions are seen as quite different from criminal sanctions, and administrative cooperation as an activity quite different from cooperation in criminal matters. In institutional terms, the imposition of administrative sanctions for infringements of Community law is seen as a matter in which the Community has legislative and other powers. Consequently, administrative cooperation between Member States in enforcing Community rules is also a matter for the Community to regulate. On the other hand, the imposition of criminal sanctions and cooperation in criminal matters with a view to enforcing Community rules are considered to be matters for which the Members States are solely competent. This dividing line corresponds to the separation of the First and Third Pillar of the Union and has now received explicit constitutional underpinning in two provisions of the Treaty of Amsterdam. Both Art. 135 and Art. 280 of the consolidated version of the EC Treaty forbid the Community institutions to take measures concerning the application of national criminal law and the national administration of justice where customs cooperation and fraud affecting the financial interests of the Community are concerned.[12]

III. Administrative sanctions in disguise

Given the lack of power of the Community institutions to set penal sanctions, it is hardly surprising that administrative sanctions gained increased importance at European level. The emphasis on administrative law enforcement generated two questions in relation to the Community's competence to impose sanctions.

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10 Case C-186/87 Cowan (Jan William) v Trésor Public [1989] ECR 195, [1990] 2 CMLR 613.

11 SWART, B.: The Shifting Boundaries of European and National Enforcement; Some Comments on the National Dimension, in: *Compliance and Enforcement of European Community Law* (ed.: Vervaele, J. A.), The Hague–London–Boston, 1999, 361.

12 Also Art. 51 of Council Regulation No. 515/97.

The first concerns *whether* and *to what extent* the Community may oblige Member States to impose sanctions for non-compliance with Community law. The second relates to the Community's competence to impose punitive rather than purely administrative sanctions.[13] As *Sieber* asked provocatively: can the Community circumvent its lack of competence in the domain of criminal law by labelling the imposition of sanctions amounting to several millions of ECU as administrative sanctions.

III. 1. The scope of the Commission's competence in the administrative-penal field

Although enforcing Community law is primarily a responsibility of the Member States, gradually the opinion has prevailed that the Community has competence to regulate these enforcement activities, for instance by laying down rules with respect to sanctions that should be imposed, or investigations that should be carried out. Especially in the areas that directly affect the Community's financial interests like agricultural policies or fisheries, a serious effort has been made to harmonise the imposition of sanctions by the Member States.

Originally the only provisions of the Treaty which prescribed the imposition of financial penalties on persons who have violated certain obligations of Community law[14] were contained in Art. 87 (in connection with the rules on competition); in Art. 9 of Commission Decision No. 2794/80/ESCS (in connection with establishing a system of steel production quotas)[15] and in Art. 58(4)

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13 WHITE, S.: *Protection of the Financial Interests of the European Communities: the Fight against Fraud and Corruption*, Kluwer, 1998, 36.

14 The Council Regulation on Harmonisation of Controls and Sanctions in the Framework of the Common Agricultural and Fisheries Policy laid down specific penalties which apply in the event of infringements by the beneficiary of the conditions of the aids regime. The sanctions typically provided are reduction in, or total loss of, the aid of which the beneficiary would have been entitled to, the exclusion of the beneficiary from the aid scheme for subsequent marketing years, or the withdrawal of the licence necessary for an operator or processor. The Commission has maintained that these are administrative penalties which the Community has the competence to lay down by virtue of Art. 43 of the EC Treaty. Germany initiated proceedings before the Court concerning the legal nature of such sanctions. Germany insisted that the sanctions in question are of a criminal character, but the Court supported the view of the Commission and rejected the German application.

15 Commission Decision No. 2794/80/ESCS of 31 October 1980 Establishing a System of Steel

of the ECSC Treaty (in connection with steel production). The Commission, however, held the view that its general competence to execute decisions of the Council implies the right to apply sanctions, on condition that such a right has to be made explicit in a Regulation. The Commission especially arrogated to itself authority to lay down rules on controls (by officials of the Commission) and to impose sanctions (by the Commission).[16] Although this position was contested by several Member States[17] at present the recent *Regulation on the Protection of the Financial Interests of the Communities* resolves any doubts about the Community's competence in the administrative-penal sphere.

The Regulation is a general framework for investigating and repressing acts and omissions that by violating Community rules, cause financial harm to the Community, or could do so. It lays down minimum standards for punishing EC fraud. Because it covers the entire field of Community finances, this Regulation is also referred to as a *horizontal regulation*. The Regulation distinguishes between reparative measures and repressive sanctions. The so-called *administrative measures* aim at recovering benefits unduly received, whereas *administrative sanctions* seek to punish and deter rather than to confiscate proceeds. The Regulation itself draws three different consequences from the distinction. Administrative measures must, as a general rule, always be imposed while Member States have more freedom in deciding whether or not they will impose administrative sanctions. Moreover administrative sanctions may only be imposed for intentional or negligent acts or omissions. Finally, the principle of non-retroactivity applies only to administrative sanctions. By making this differentiation in the consequences, the Regulation acknowledges that administrative sanctions, not being different in nature form criminal penalties, require stricter rules than administrative measures as to their application out of respect for fundamental individual rights as well as basic principles of criminal justice.

Although the Regulation only codifies the minimum obligations of Member States in the area of enforcement and offers few surprises, it is worth noting the apparent need for a regulation that states the obvious, due to the reluctance of Member States to enforce Community law effectively.[18]

Production Quotas for Undertakings in the Iron and Steel Industry, OJ L 291 of 31 October 1980, 1.

16 Commission Proposal for a Council Regulation on the Checks and Penalties Applicable under the Common Agricultural and Fisheries Policies, OJ 1990, C 137, 10.

17 KAPTEYN / VERLOREN van THEMAAT: *Introduction to the Law of the European Communities,* 2nd ed., 1990; OEHLER: *op. cit.* 1403; ZULEEG: *op. cit.* 45.

18 SWART, B.: From Rome to Maastricht and beyond: The Problem of Enforcing European

III. 2. The legal character of sanctions applied: the emergence of a functional approach

It is not always easy to decide whether a sanction is a truly penal sanction or rather an administrative one. The movement towards individualisation within penal law leading to diversification of sanctions makes it more difficult to demarcate each of the systems of sanctions, for the penal sanction can no longer be identified with the deprivation of liberty. The philosophical foundations of the penal sanction *vis-a-vis* those of the administrative sanction became equally difficult to identify.[19] Is the difference qualitative or quantitative? The legal terminology of the Community draws a clear distinction between penal and administrative sanctions so as to create the impression that these constitute two completely distinct areas of law, the first of which is wholly separate of Community law whereas the second, at least to some extent, is not.

Problems especially arose from administrative wrong (*Verwaltungsunrecht*) or regulatory offences.[20] In European Community law, fines are the typical sanctions for such offences. Like in genuine criminal law, these sanctions are applied irrespective of the reestablishment of lawful circumstances. Fines presuppose also a fault on behalf of the responsible person as criminal law does. E.g. as regards Art. 87, the Community has power to impose pecuniary sanctions for violations of the rules on competition and of obligations to provide information needed to enforce these rules.[21] Art. 87 of the EC Treaty authorises the making of Regulations to give effect to those rules and expressly includes provisions for *fines and periodic penalty payments*. This power has been exercised by Regulation No.17 on the basis of which the Commission can fine companies or association of companies that deliberately or negligently violate the provisions of Articles 85 and 86 regarding cartels and the abuse of economic powers, deliberately or negligently false or distort information, fail to produce requested information in a timely manner, or refuse inspection of their business records. Even though the penalties may be quite substantial, the applicable

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Community Rules, in: *Enforcing European Community Rules*, (Ch. Harding–B. Swart eds.), Dartmouth, 1996, 14.

19 DELMAS-MARTY, M.: The legal and practical problems posed by the difference between criminal law and administrative criminal law, *Revue Internationale de Droit Pénal*, 1988, 21.

20 ZULEEG, M.: Enforcement of Community law: Administrative and Criminal Sanctions in a European Setting, in: *Compliance and Enforcement of European Community Law* (ed.: Vervaele, J. A.), 1999, 351.

21 This sanctioning power is elaborated in Council Regulation 17/62 of 6 February 1962 Implementing Articles 85 and 86 of the Treaty, 1959–1962 OJ Special Edition 87.

regulation states explicitly that the decisions by which fines are imposed are not of a penal character.[22] Indeed, these measures do not entail a moral reproach as penal sanctions do. They are imposed by administrative bodies and not by the judiciary. On the other hand, safeguards similar to those of criminal law are necessary because of the severity of these sanctions. In this respect, fines are assimilated to criminal law.

With regard to the Community's competence to impose punitive sanctions, the Court has consistently declined to be drawn into the distinction between penal sanctions and administrative sanctions. It held in *Chemiefarma* that the imposition of fines is not limited to the repetition of an offence; such an interpretation of Art.15 would considerably lessen the deterrent effect of the fine. Furthermore, the Court made clear that the imposition of fines serves both the punishment of offences committed in the past and ensures the obedience to Community law for the future.[23] Accordingly, the Court expressly recognised that fines under Art.15 fulfil the two of the constitutive elements of a penal sanction, i.e. suppression and prevention. The Commission follows a practice similar to that of the Court. The current sanctioning policy of the Commission shows that it attaches great importance to the deterrent object of the fine. For the first time in the *Pioneer* proceedings the Commission has considerably increased the fine and thereby marked the start of a stricter policy as regards gross violations of competition law.[24] The Court justified the shocking amount of the fine by saying that one of the tasks of the Commission is the obligation to investigate and suppress illicit conduct. This includes the exercise of a general policy the objective of which is to ensure the application of fundamental principles of Community law and to co-ordinate the conduct of companies in the light thereof. Hence, the amount of the fine must be adjusted to the requirements of that policy.[25] Both, Court and Commission, take into consideration the same criteria when imposing the fine. These are the followings: the gravity and duration of the violation, the relationship between the type of the violation and the economic strength of the company and the delays in the Commission's own reaction.[26] The Commission delivers its decision in a way that it compares the

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22 Currently the maximum possible fine is 1.000.000 ECU or 10% of the undertaking's previous year's turnover.

23 Case C-41/69 of 15 February 1970, ACF Chemiefarma v Commission [1970], ECR 661.

24 OJ L 60 of 5 March 1980, 21.

25 Case C-100-103/80 of 7 June 1983, Musique Difusion Francais, Pionner, Melchers, [1983] ECR 1825; [1983] 2 CMLR 221.

26 See Case C-86/82 Hasselblad (G.B.) Ltd. v Commission [1984] ECR 883, [1984] 1 CMLR

decision to the earlier ones with the aim of preventing the company from committing similar violations.[27]

It has to be mentioned here that Ag Roemer made an attempt to classify fines according to the legal systems of the Member States. He came to the result that fines bear the same legal character as "*financial penalties*" [Geldbuße] which under the German law belong to the scope of regulatory offences, i.e. to criminal law.[28] While, Ag Mayras described the fines in *Boeringer II* as "administrative sanction of a non-penal character"[29] which, however, due to their substantive criminal nature cannot be separated from all the principles of criminal law. The opinion of Ag Mayras clearly mirrors the very fine line which is to balance, between on the one hand, the requirement that the rule of law is upheld, i.e. substantially criminal sanctions are subject to the guarantees of criminal law, and on the other, that the Community does not interfere with the discretion of Member States as regards criminal law.

In 1992 the ECJ gave a ruling in *Germany v. Commission*[30] which clarified the power of the Commission to introduce sanctions with a punitive, rather than a purely remedial or compensatory character. The ECJ recalled its ruling in *Köster*[31] to the effect that the impositions of penalties came within the Commission's powers if the Council had not reserved such powers to itself. The penalties laid down by Community law are meant to be enforced by the national authorities and not (as in the area of competition) by the Community institutions themselves. This, in turn, raised the question as to the nature of the sanctions to be applied in the Member States. The Court confirmed that in general terms the Community has competence to prescribe sanctions that go further than forfeiture of benefits unduly received. It also denied that some of these sanctions amount to criminal penalties. In other words, in the opinion of the ECJ the Community is competent to prescribe sanctions that have a punitive character without being criminal.

559; Case C-19/77 Miller Int'l v Commission [1978] ECR 131, [1978] 2 CMLR 334.

27 TSOLKA, O.: Der Allgemeine Teil des europäischen supranationalen Strafrechts i.w.S., *Europäsche Hochschulschriften*, vol. 1655, 46.

28 Case C-14/68 Wilhelm v Bundeskartellamt, 1969 ECR 1, [1969] 1 CMLR 100.

29 Case C-7/72 Boeringer Mannheim GmbH v Commission [1972] ECR 1281.

30 Case C-240/90 , Germany v. Commission, [1992] ECR I-5383.

31 Case C-25/70, Einfuhr und Voratsstelle für Getreide und Futtermittel v. Köster, Bertold & Co., preliminary ruling ECR [1970] 1161.

All aspects of the Court's judgement cannot be discussed here. What is most striking, however, is the narrow concept of what constitutes a criminal sanction within the framework of Community law. Moreover, this narrow approach obviously differs from that of the European Court of Human Rights. According to the latter if the purpose of the sanction is punitive, if the class of persons to whom the norm applies indeterminate, and if the magnitude of the sanction is considerable, then the proceedings will be regarded as procedures for the determination of criminal charges within the meaning of Art. 6 of the European Convention on Human Rights and the terms of that article has to be met.[32]

These consideration lead part of legal scholarship to argue in favour of a *functional definition* of penal sanctions, which does not depend on institutional criteria (i.e. who imposes the sanction), but rather on human rights criteria.[33] Accordingly, the distinction should not be drawn between criminal law and administrative penal law, but rather between administrative penal law and the rest of administrative law. In this approach administrative penal law sanctions underlie the same fundamental guarantees as penal law sanctions. This approach is also supported by the case law of the ECJ, according to which

> [a] penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis.[34]

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32 Notwithstanding that the Court has upheld certain administrative proceedings in a limited class of cases involving petty offences, the proceedings leading to the imposition of cartel fines by the Commission do not fall within this exception, given the magnitude of the maximum sanction available. The European Court of Human Rights took the position in *Öztürk* that the cited Art. 6 requirements need not be observed at all trials of the first instance provided that an appeal may be lodged to a higher tribunal complying fully with Art. 6. Accordingly, the Court upheld summary administrative proceedings in Germany for traffic and other property offences. The fact that such proceedings are designated as administrative is irrelevant since parties to the ECHR are not allowed to circumvent their obligation undertaken in Art. 6 simply by labelling certain procedures administrative.

33 HEITZER, A.: *Punitive Sanktionen im Europäischen Gemeinschaftsrecht*, Heidelberg, 1997, 18.

34 Case C-117/83, Könecke v. BALM, [1984] ECR 3291; Case C-137/85, Maizena v. BALM, [1987] ECR 4587.

Furthermore, a penalty must not be retroactive.[35] It must be appropriate and necessary and proportionate to the objectives to be attained,[36] and must only be applied after the person concerned has had an opportunity to make know his/her views. The requirement of judicial control also applies to administrative decisions.[37]

The fact that Court applies criminal law guarantees to so called *administrative penalties* clearly demonstrates the Community's tendency to use the term administrative in disguise. Such a tendency exists not only with regard to substantive law, but also in the field of procedural law. The most recent example is provided by Regulation 515/97 on mutual assistance between the administrative authorities of the Member States in customs and agricultural matters. Various provisions of that Regulation make it clear that the purpose of administrative cooperation will often be to investigate criminal offences and to collect evidence against persons who are suspected of having committed them. In so far this is the case, one could say that administrative cooperation amounts to cooperation in criminal matters, albeit in disguise again. One could go even further by saying that to a large extent administrative cooperation has come to replace cooperation in criminal matters.[38]

Due to the institutional approach of the Community to administrative sanctions and administrative cooperation, the scope of the latter has been expanded to include types of sanctions and forms of cooperation which, in a functional approach, would be considered penal sanctions or cooperation in criminal matters. It may very well be the case that this development will contribute to more efficient enforcement of Community rules, but there is also a definite danger that a price will have to be paid in terms of the rights of the individual person.

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35 Case C-63/83, R. v. Kirk, [1984] ECR 2689, at 22. "[T]he principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Art. 7 of the ECHR as fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice."

36 Cases C-319/90, Pressler v. Germany, [1992] ECR I-203, at 12; C-326/88, Anklage-myndigheden v. Hansen, [1990] ECR I-2911; C-15/83, Denkavit, [1984] ECR 2171; C-122/78, Buitoni v. Forma, [1979] ECR 677.

37 Johnston v. Chief Constable of the RUC, [1986] ECR 1651 at. 18.

38 SWART: *The Shifting Boundaries of European... op. cit.* 327.

III. 3. The protection of individual rights

The European Union has been strongly criticised over the last decade for its over-emphasis on crime suppression and for its lack of attention to human rights protection.[39] Unfortunately, this criticism seems to be true, especially by looking into recent Community instruments concerned with administrative penalties and administrative cooperation. They are entirely silent on individual rights.

The *Regulation on the Protection of the Financial Interests of the Communities* does not attempt to lay down a comprehensive set of procedural rights for the benefit of the individual where the imposition of administrative measures and sanctions pursuant to its provisions are concerned. The protection of individual rights is left entirely to the discretion of the Member States. The Community legislator missed to incorporate the above cited case law of the ECJ concerning human rights safeguards by the application of administrative penalties. Apparently, legal protection is not seen as the primary concern of the Community institutions themselves. The only exception is contained in Art. 2 on the principle of legality and Art. 3 laying down time periods for proceedings.

Similarly, Regulation 515/97 makes no mention to any individual right within the framework of requesting and granting administrative assistance, e.g. the right to be informed of a request for assistance, or the right to present one's views. Again, the matter is entirely left to the discretion of the Member States. If it is true, that in Regulation 515/97 administrative cooperation largely replaces cooperation in criminal matters, then there is an immediate danger that the rights of the individual in its capacity as suspect or accused will be jeopardised, his right to the presumption of innocence and the privilege against self-incrimination in particular. Moreover, administrative cooperation may also deliberately be used to circumvent those rights.

IV. Corpus Juris: the evolution of a European enforcement level?

The above described adverse effects of European integration result from the fact that the socio-economic integration in the Union was not paralleled by justice integration.[40] Justice integration is impeded mainly by the political attitude of

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39 WYNGAERT, C. VAN DEN: General Report, *Revue International de Droit Pénal,* vol. 70., 1999, 149.

40 On the tensions between socio-economic integration and justice integration see VERVAELE: *op. cit.* 363.

the Member States which protect this area as their last domain of sovereignty. It had been pointed out by several scholars that the lack of the Community's competence in the field of criminal law is more a political dogma than a legal necessity.

The consequence of this rather prudent and conservative attitude of the Member States towards a Community competence in the penal field is that although e.g. rules on customs tariffs, customs procedures, etc. are harmonised to a large extent, even to the point that there is a common Community Customs Code in force, the enforcement of these rules is a domestic issue. The *actus reus* is pre-defined by Community norms, but the procedural elements, the *mens rea*, and the sanctions are defined by 15 domestic criminal laws. There is no Community incrimination or Community judicial competence in this sense.

This obviously undesirable situation could be resolved by the development of a European-level of enforcement system. The Corpus Juris proposal, mentioned in Professor Lahti's article represents one step in this direction. Such a proposal, of course, commands both enthusiasm and criticism. There is no possibility here to address the *pro* and *contra* arguments with regard to the Corpus Juris. The author only wishes to recall the opinion of the group of experts that drafted the proposal, according to which effectiveness is not *per se* incompatible with human rights guarantees.[41] On the contrary, by re-inforcing the six guiding principles, ensuring the independence of the European Public Prosecutor and by the creation of a pre-trial chamber the legitimacy of the Corpus Juris can be strengthened. Furthermore, one should not forget that the Corpus Juris is not meant to be a criminal code, in the traditional sense of the term.

The requirement that freedoms must remain paramount in Europe does not eliminate the intolerable situation that frontiers are wide open to criminals whilst being shut to criminal prosecution. The feasibility study on the Corpus Juris showed that harmonisation, assimilation and cooperation are not enough to protect the financial and other interests of the European Union. In this context, the Corpus Juris should be welcomed as an innovative proposal.

On the other hand a European legal space cannot be constituted only by criminal law. Criminalisation must be conceived as a solution of last resort,

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41 DELMAS-MARTY, M.: Necessity, legitimacy and feasibility of the Corpus Juris, in: *The implementation of the Corpus Juris in the Member States, Penal provisions for the protection of the European Finances* (2000), (eds.: Delmas, M.-Marty–J. A. Vervaele), 103.

and the emergence of certain *eurocrimes* should be paralleled by the elaboration of an anti-crime policy. It is necessary to maintain in Europe a fair balance between effective law enforcement and the protection of individual rights.[42]

42 In the same sense SCHUTTE, J. J. E.: Police cooperation, in: *International Criminal Law in the Netherlands* (eds: Swart, B. and Klip, A.), 1977, 169–172.

ACTA JURIDICA HUNGARICA
2000 41 Nos 3-4, pp. 213-223

1216-2574 / 2000 / USD 5.00

Réka VÉGVÁRI

Towards the Real Cross-examination Criminal Procedure in Hungary

Act of XIX/1998 on Criminal Procedure that had become known in the eyes of the public and the legal sciences as "The New Code on Criminal Procedure" was promulgated by the Hungarian Parliament on its session of 10th of March 1998. The reason for the creation of such an Act was the eagerness to finally get rid of the criminal procedure act of the socialist era, e.g. to get rid of its principle of equality of two main phases: the investigation and the procedure in front of the court. Also it was among the purposes of the new act to adjust our rules of procedure to the regulations of the Western European Countries. The legislator was took into consideration the general principles and institutions of Act XXXIII of 1896 on Criminal Procedure, without reviving its surpassed parts. The practices of the Strasbourg institutes were considered as well.

According to the original intention of the legislator the new Act would have been in force as of 1st of January 2000 at the same time when the previous act was about being lapsed, but the Parliament, by the Act CX of 1999, postponed its force until 1st of January 2003.

Since the new Act promulgated but has not been in force, a special situation arose, as more of its regulations, word by word, went through via modifications of the old Act and adapted via its existing institutions, so the new Act became applicable one or the other way. Due to the changes of the substantial criminal law and due to the decisions of the Constitutional Court, also to the above mentioned modifications derived from the new Act, the old Act had been modified

ten times between the time of promulgation of the new Act. i.e. between the 23rd of March 1998 and September 2000.

Throughout the last few years it was visible that persons under criminal procedure, their accessories and/or their relatives tried to frighten the witnesses, therefore it is an obviously important and urgent task to protect the witnesses. One of the most important change touched that field by transferring this regulations to the old Act with Act LXXXVIII of 1998, due to the fact that it did not bear delay, as well as the regulations of attachments, protection of persons participating in criminal procedure, undercover agents, and postponing the charge against an adult offender.

This Act, in accordance with the decision of the Constitutional Court, converted the delivery and acknowledgment of the state confidential files, official files, and added the regulations about the copying rules of such files.

Going into more details regarding these changes, the rules of protection of witnesses should be in the focus, as this is one of the token of the successful procedure.

According to both Acts, a witness may be pronounced as a specially protected witness, whose testimony has a specific importance about the very serious case, whose deposition brings a proof that cannot be derived from other sources, whose personality and living address is not known by the defense and by the offender, and his/her life, bodily safety or personal freedom would be in danger in case of disclosure. These conditions shall exist aggregately for being specially protected. In case such a witness participates in the procedure, the rules of misdemeanor procedure is not to be applied. The minutes of the deposition shall be attached to the court copy of the indictment. The President of the Court Council informs to the offender and the defense, at the same time of the delivery of the indictment, if the prosecutor wants to use the deposition of a specially protected witness as a proof, warns them that they are allowed to look up the files including the deposition and to ask questions in writing regarding to it. This is all necessary as the specially protected witness shall not be questioned at the Court trial. The main difference between the two procedural acts can be found in the person who decides about being specially protected witness, and who process the questioning. According to the new Act, the investigating judge decides about declaring someone being specially protected witness, he is questioning the witness and only the prosecutor and the advocate of the witness shall be in present. In case the defense or the offender submitted questions against the witness under protection, and therefore a repeated questioning is necessary, it shall be done also in front of the investigating judge. The Act in force does not know the institution of the investigating judge, therefore this

questioning procedure is under the Section of the Special Procedures, and is led by the local judge appointed by the President of the County Court. He is to decide about the prosecutor's proposal of appointing someone to be under special protection, he is to question the witness, and he is to order the visit of the scene with the participation of the witness, also the presentation of identification.

We know—as on the XVI Congress on Penal Law was also stated—that "resources to anonymous witnesses, is not normally possible without violating the rights of defense."[1] Resources to anonymous witness also would infringe the principle of directness. The Hungarian laws are mostly in compliance with the Resolutions, with the exception of the hearing of the anonymous witness where the defense could not participate. We should find the appropriate technical solution to have the defense in present at the hearing.

The regulations of the undercover agent is new in the old Act as well. According to both laws the investigating authority, with the prosecutor's approval, may apply for an investigating agent who is undercover. The prosecutor may deny to proceed against the undercover agent who is charged with criminal offense, or, according to the new Act, that is using this *tecnicus terminus*, may refuse the criminal report, or may terminate the investigation, if the offense was committed during the investigation in order to disclose another crime and this purpose is important than the committed crime. These decisions however shall not be made if the undercover agent is being charged with homicide.

Act CX of 1999 introduced essential changes in the Criminal Procedure Act. These are about namely the witness-protection, about coercive measures limiting personal freedom, about attachment, and about the data acquisition activity of the authority. At the same time this act introduced avowry and remedy for legality, the disclaim trial, and the procedure against the absent offender.

The means of admission was being expanded as well, with the possibility of written form. The authority may allow the witness, after or instead of the oral questioning, to give his/her admission in a written form, write and sign it personally, or have the typed text signed by him/herself and by witnesses, or certified by a notary or a judge. The written admission shall include that the witness gave it knowing the consequences of false witnessing. The witness shall be warned about these consequences while allowing the written form.

The system of the coercive measures became more combined. The modification introduced home custody. This coercive measure limiting personal freedom may be ordered by the court, not like the prohibition of leaving home,

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1 XVIth International Congress on Penal Law, Resolutions.

which may be ordered by the prosecutor before submitting the indictment. I have to add here, that the new Act authorizes the court to decide about this question while transferring into the investigating judge's competence. Coming back to home custody, the police controls, with means like permanent guarding or, in case the offender is in concurrence, with moving detectors, if the regulations were kept. Dispossession of passport or personal ID card, which became part of the Act, is also limiting the personal freedom. Right before that change, the Act on Passport used to include these regulations.

The obligatory cases of dispossession of passport and ID card is where the offender is in custody, is prohibited leaving home, or is under temporary compulsory medical treatment. The prosecutor, before the submission of the indictment or the judge after the submission may order the dispossession if the criminal procedure is on due to an offense where the punishment may be three years or more imprisonment and the dispossession is a reasonable mean to ensure the presence of the offender on the procedural acts. At the same time, the prosecutor, before the submission of the indictment, and after it the judge may approve, upon the offender's reasonable request, that the passport authority make the offender able to travel abroad for a defined period of time. Where the offender is in custody, his passport or ID card shall be dispossessed, and the repossession is be dependent on what measures took place against him.

Considering the procedural changes on the investigating authorities, the eligibility for other data acquisition activity is now included in the Act, which used to be part of the Police Law before. According to the Criminal Procedure Act the investigating authority, after initiating the investigation, may commence nosing around to determine if there are efficient proving tools and if so, where those can be found. For this purpose the authority may collect information, ask for enlightenment, may look up files, investigate the scene of the offense, may ask for experts, and may check the available data. During this activity, the authority may choose a person or a subject using photos or other data providing tools, and may put questions about them. A report shall be made about these activities.

The modification that introduced the procedure in case of the absence of the offender, which may speed up the procedure, provides a breakthrough change. Where the offender stays in an unknown place, besides the measures to find him, the authorities have to locate the proving tools and have to secure those. In case they do not succeed to find the offender, the prosecutor, in the indictment, may propose to hold the trial in the absence of the offender, and before the submission of the indictment, he appoints a defense attorney for the offender who has no retained attorney and at the same time ensure that the attorney may look

up the files. In case of a charge, the court issues a warrant if it did not do so before. In case the offender is found before the commencement of the trial, the court informs the prosecutor and at the same time orders the necessary coercive measure limiting personal freedom. In case the offender disappears after the submission of the charge, and the trial may be held in his/her absence, the judge asks the prosecutor if he wants to propose it, and at the same time issues a warrant. If the prosecutor wants to hold the trial, he proposes it in fifteen days and where there was no defense attorney before, the prosecutor proposes the appointment of one. The judge suspends the procedure if the prosecutor does not submit the above mentioned proposal. The prosecutor and the defense attorney participation is obligatory in case of a trial in the absence of the offender.

Where the measures to find the offender succeed, the court continues the trial by reviewing the material from the former trial. In case the offender is found after the first sentence has been made, the offender may ask for a new trial, instead of an appeal. During the new trial the minutes of the former admissions and expert's opinion shall be read instead of new hearings. Depending on the results of the new trial, the court keeps the former sentence, or decides on new sentence. In case the offender is found in the appeal phase, the higher court may, upon the offender's request, decides to annul the first level court decision and order a new first level trial.

In case the offender's stay becomes known after the first level absolute sentence made, a case retrial may be requested by him, or may be proposed by the prosecutor. If the offender stays abroad and there is no possibility of extradition or it had been refused, and there is no way to transfer the criminal procedure either, the prosecutor may propose in his indictment that the trial to be held while the offender is absent. In case the court states in the trial phase that the offender cantle extradited or it had been refused and the court do not see the reason for transferring the criminal procedure, the judge asks the prosecutor if he/she wants to have the trial held in the offender's absence. Where the above mentioned becomes known after the commencement of the trial in case of the offender absence, the court continuos the trial without asking the prosecutor. The procedure against an offender abroad is the same as said before about the offender staying an unknown place.

The disclamation of the trial, which was again taken from the new Act and incorporated into the old Act, also aims to speed up the procedure. The court, upon the prosecutor's proposal, where the punishment of the offense under procedure does not exceed eight years imprisonment, may determine the guiltiness of the offender and may inflict punishment without holding a trial (but in the presence of the offender) (word by word translation is: public assembly),

if the offender disclaims his right of having a trial and pleads guilty. The presence of a defense attorney is obligatory from the time the prosecutor submitted the indictment. The inflicted punishment shall not exceed three years imprisonment in case of an offense punishable with more than five years and less than eight years, and it shall not exceed two years in case of a possible imprisonment more than three years but less than five years imprisonment, and the inflicted punishment shall not be more than six months in case of an offense with possible punishment of imprisonment for less than three years.

The prosecutor, having examined all the circumstances of the case, may propose to decide about the case without holding a trial. The condition of this process is that the offender shall plead guilty during the investigation and he shall initiate to have a decision during a public assembly of the court. The prosecutor informs the offender about the possibility of the disclamation of the trial and about its consequences, and a minutes is taken about it, including the offender's admission. This minutes may be attached to the indictment, as a part of the investigation files, only if the offender initiated the proceedings without having a trial. Where the offender did not plead guilty, he has a chance, after the completion of the investigation, but not later than the fifteenth day of the delivery of the indictment, to ask the prosecutor to propose deciding about the case in front of the court but without holding the trial. In case of a concurrence the prosecutor questions the offender and tell him that he accept the initiation, and then proposes to go on with the procedure but without the trial. The prosecutor assigns a defense attorney for the offender in case he/she has not had one before, and let the attorney look up the files. The prosecutor shall not take his proposal back, but if it is obvious for him from the results of the procedure that the offender should be punished for a more serious crime or should be punished for another crime, he may propose to have a trial instead. In case the prosecutor did not propose the procedure without holding the trial, he shall not inform the court about the offender's such initiative, and shall not submit any file to the court in this respect.

In case of disclamation of the trial only one judge proceeds. The presence of the prosecutor and the defense attorney is obligatory in this case too. After opening the courts procedure, the prosecutor introduce the charge and the proposal for the procedure which is followed by the judge's guidance to the offender about the consequences of the pleading and of the disclamation of the trial. The offender here has to state that he agrees with this process, then the judge asks questions from both the offender and the prosecutor to find out if there is any obstacle to decide about the case without the trial, and then he commences the case.

The judge questions the offender about the circumstances of the charged case. The guiltiness is based on the offenders pleading and on the files of the investigation. The judge transfers the case to a trial if

– there is an obstacle to go on with the procedure without the trial,

– the offender refuses to plead,

– during the questioning the judge verifies that the offender is non compos, or there are doubts about the offender's voluntarity on the pleading, or the offender's admission is essentially different than before,

– it seems that a more serious qualification of the offense shall be verified.

With the exception of the last but one above, there is no place for appeal.

If the prosecutor, upon the offender's request, proposed to take proceedings after the submission of the indictment and the court proceeds in a trial, the trial shall be held immediately, if all the parties are in presence and there is no other obstacle.

Possibilities of appeal, by nature, is limited. One may not appeal in case the confession and the investigation files contains the same. In case of the prosecutor appeal for aggravation the higher court may inflict a punishment within the punishment frames mentioned above. The higher court, annulling the sentence, orders the first degree court to proceed again, if the procedure was set in the absence of the legal prerequisites.

Though the regulations of the new Act detailed above shall be applied directly, it does not mean that the old Act is not superseded partially and is not wearing the old regime's signs. The new Act intends to innovate the old one, to annul its less productive processes, and, at the same time to keep its well working practices and processes.

The new Act on Criminal Procedure differs from the old one in its structure, and in its content as well. In consistent with the Article 6. of the European Convention on Human Rights, the right of access to court became part of the general principles, which says that everyone has the right to a fair trial, and the court, only the court can establish someone's guiltiness or inflict a punishment. This general principle has been extended to the measures too. A punishment, of course, could have been inflicted only by the court formerly too, but the admonition, that is among the measurements in the Criminal Code, could have been inflicted by the prosecutor too. This measure was applied in many cases, where the offense was of slight dangerousness, most especially in juvenile offenses, in front of the prosecutor. This meant that the majority of the mentioned offenses did not go through the court and trial process, only that minority of those cases, where the convicted person complained against the measure. Having proceeded this way, the workload of the courts had not been

increased. The new Act however, with its new regulation, transferred the infliction of admonition to the court.

The right for defense has also been extended with the declaration of the right for defense while unarrested.

The prohibition of the obligatory self-charge became part of the general principles. The old but still valid Act states, under the Article of the presumption of innocence, that the offender is not obliged to prove his innocence, while the Article of questioning the offender contained the right of silence. The new Act principally contains the same regulations, but summed up the two in one under the title "prohibition of obligatory self-charge," meaning that nobody can be obliged to provide evidence against himself/herself, nor to give a confession against himself/herself.

The use of native language has been expanded with the rule saying everyone has the right to use another language known by him/she, also with the rule saying that the language of the process in front of the court may be the language of a minority ethnic group.

The present Act, under its chapter of "Authorities in Criminal Cases", sorts, in the following order, the essential tasks of the investigating authorities, the prosecution and of the court, also the composition of the court, which is followed by the competence and the jurisdiction, then the articles of the dismemberment of the authority. The new Criminal Code changed this structure totally, included the regulations of the court, the prosecution and the investigating authorities in different. Having done so, the new Act became well-arranged, as all the rules of a titled authority are included in one chapter. Also the interest of the legislator is emphasized in this new structure to state the importance of the trialing phase by changing the order of the authorities (court, prosecution, investigating authority).

An essentially new role is the investigating judge, who has to deal with the tasks of the court in certain cases before the submission of the indictment. He is to decide about the coercive measure limiting personal freedom, about caution, about searching the notary's office, the attorney's office, the health care institutes, in certain cases about confiscation, about the sale of the confiscated property, about arrest, about ordering mental observation, about the disqualification of the defense, about permitting secret data collection, about ordering the continuity of the process in case there is nobody complaining about the measure taken and the prosecutor did not order to continue the investigation either. It is also among the tasks of the investigating judge to decide on appointing a specially protected witness, and about police's or prosecution's decisions about searching, also about the decisions on non-delivered deliveries,

and about decisions on confiscation the files of an editorial. The investigating judge questions the protected witness, also that witness whose life is in danger, the witness under fourteen if the questioning in front of the court would affect his/her ability to grow up. He also may order evidence process upon request if the evidence would not be available during the court phase, or would be changed in its essentials, or would loose its evidence matter.

The new Act implemented the two degree appeal system. In reality that was the reason to postpone the entry ito force of the new Act, as the construction of this structure cannot be done in a short time frame. On the first instance, as it used to be, the local or the county court proceeds, on the second instance, the county court for those cases where the local court has jurisdiction, while on cases where the first instance court is the county court, the Court of Appeal proceeds on the appeals. On the third instance the Court of Appeal and the Supreme Court proceeds depending on who proceeded on the second instance: the county court or the Court of Appeal.

The structure of the two instances appeal creates changes. The reformatory power of the second instance expands. It becomes a general rule that this forum may order evidence process if the case is not explored, or if there is a chance to establish a different fact. It seems that with this regulation the number of those cases will decrease where the first degree court's sentence is annulled due to the reason of unsubstantiation. Cassation may take place if only a tremendous new evidence process would help to cease unsubstantiation.

The third instance appeal is called re-examinatory procedure in the Act. The facts are not under supervision here, decisions are made only in respect of legal questions. Formal—the court was not established legally—and substantial—the illegal qualification of the offense—annulling reasons may be considered in the re-examinatory request. The punishment may be changed in the third instance appeal only if the court modifies the qualification of the crime, or if the court states that the punishment shall be inflicted in a different legal frames. This limitation may be disengaged if the guiltiness was stated by the second instance court and based on different fact. There is no trial at the third instance appeal, as only legal questions are decided here. The sentence is made on a council-board.

The regulations considering the prosecution also changed in the Act, the obvious fact is declared that the prosecutor is a public prosecutor. Crimes belonging to the exclusive investigating power of the prosecution now are part of the Criminal Procedure Act, while they used to be part of a different law. The investigation leading role of the prosecution has been emphasized, namely the chapter on the investigating authority states that the investigation is based on the prosecutor's order.

The pool of the participating persons also has been expanded with the sub-private accuser and with the helpers. The victim, in certain cases, may act as a sub-private accuser, if the prosecutor ceased the charge, or the criminal report had been declined. If the sub-private accuser died, his/her relative, spouse or legal representative may act on behalf. According to the law, the legal representation of the sub-private accuser is obligatory.

The helpers may act for the witness and the offender. Where there are more victims, or an unknown groups of people shall be considered as victims, a registered social body may submit its opinion on the case to the court.

The Chapter of "General Regulations of the Procedural Acts of the Court, the Prosecution and of the Investigating Authorities", disposes that the court and the prosecutor may encharge the notary of the local government with the necessary procedural acts to perform for the interest of the criminal procedure. The personal data recorded during the criminal procedure may not be deleted, unless the law states differently.

The new Act authorize the court to inform the superior prosecutor, if the prosecutor has not participated in a procedural act where it should have been obligatory.

The issue of the warrant of arrest is obligatory against the offender staying in an unknown place, where the suspected offense is punishable with imprisonment. According to the present Act the issue of the warrant of arrest is optional and may be done by the police as well. Once the offender is found, he shall be arrested and within 72 hours (according to the new Act within 24 hours) shall be presented in front of the issuer or in front of another authority. According to the new Act the arrested shall be presented in front of the issuing court or prosecution.

There are essential changes for the procedure of the first degree courts as well. The feature of the cross-examinatory procedure in the continental law comes to the surface in the trialing phase. The new Act approaches the evidence techniques of the first instance trial from an accusatorial model point of view.

According to the present Act the offender, the witnesses and the experts are questioned by the judge, which is followed by the questions from the prosecutor, the defense, the offender, etc., so it is visible that the judge has a leading role in the evidence process.

The new Act introduces the cross-examinatory method in certain cases. "To strengthen the cross-examinatory elements is possible primarily in the trialing system... In a formal meaning we can come to the conclusion that the Anglo-Saxon passive role of the judge is ideal, but then the client process is a necessary ingredient. This solution, however, does not comply with the prin-

ciple of the substantial truth, so the active role of the judge shall not be withdrawn."[2]

In accrodance with the new Act, the offender is first questioned by the prosecutor, that is followed by the defense, and finally the judge may ask questions, however, any answer may be followed by questions from the judges.

The new Act ergo does not degrade the court from its active role and this is understandable as considering the mixed procedural systems, this is still the court's task to search for the substantial truth, just as an opposit compared to the formal search for the truth—the forentic truth—in the Anglo-Saxon type. So in the Hungarian system we cannot give "the classic advice to a newly appointed judge that he should take a sup of holy water in his mouth at the beginning of a case and not swallow it until the evidence on both sides has been heard."[3]

So this is not to do with the transfer of the classic Anglo-Saxon cross-examinatory process, but with its variation with the continental type. The party cited the witness has the right to ask questions first. The order of the questioning is predetermined. If the witness was cited by the prosecutor, his questions are followed by the offender's questions and than the defense's. The order is just the opposite if the witness was cited by the defense. There are no different rules of questioning considering the citer or the cross-examinator, and the offender still shall not be questioned as a witness.

The interim passive role of the judge, in certain circumstances, as seen before, may become active, and even in some cases the client is forced to be passive. The president of the council may take over the questioning where the question is repeatedly on the same subject and the warning concerning this has no result. The questioning of a witness less than eighteen may also be taken over by the president of the council.

Adopting the new Act, the legislator was about to pay attention to external examples, as the cooperation between the nations is inescapable due to the increasing number of criminality. "The globalization of crime and criminal justice is a noteworthy trend"[4] and it is pretty much known that the international cooperation on criminal matters may be productive only if the legal systems of the different nations are close to each other.

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2 ERDEI, Á.: Az inkvizíciós és a kontradiktórius vonások a büntető eljárási jogrendszerekben (Incquisitory and Contradictory Elements in Criminal Procedure), *Jogtudományi Közlöny*, 4/1998, 129.

3 WILLIAMS, G.: *The Proof of Guilt*, London, 1963, 28.

4 LAHTI, R.: Towards an International and European Criminal Policy, Liber Amicorum Bengt Broms, Helsinki, 1999, 223.

ACTA JURIDICA HUNGARICA
2000 41 Nos 3-4, pp. 225-246

1216-2574 / 2000 / USD 5.00

Miklós HOLLÁN

Globalisation and Conceptualisation in the Sphere of International Criminal Law

Introductory Remarks

Professor Wiener mentions that "[w]hile an agreement has evolved in the jurisprudence concerning the meaning of 'criminal law' and 'public international law', the opinions [...] regarding what international criminal law is still diverge to a great extent".[1] The task of this report is "[...] to clear up what we mean by international criminal law", because it is "not an exact expression."[2]

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1 WIENER, A. I.: "Nemzetközi büntetőjog – nemzetközi bűncselekmények" (International criminal law–international crimes) in: *M. Cherif Bassiouni Nemzetközi Büntetőkódex tervezete* (ed.: Szük László), Igazságügyi Minisztérium Tudományos és Tájékoztatási Főosztály, Budapest, 1986, 159.

2 WISE, E. M.: "Perspectives and Approaches" in: *International Criminal Law. Vol. I Crimes* (ed. Ch. M. Bassiouni), 2nd ed., New York, 1999, 284. *See also* SCHWARZENBERGER, G.: "The Problem of an International Criminal Law" in: *International Criminal Law* (ed.: G. O. W. Mueller–E. M. Wise), New York, 1965, 4., OEHLER, D.: *Internationales Strafrecht.* 2., Neubearbeitete und erweiterte Auflage. Köln–Berlin–Bonn–München, 1983, 1., OEHLER, D.: "Criminal Law, International" in *Encyclopedia of Public International Law* (ed. R. Bernhardt), Vol. I. Amsterdam–London–New York–Tokyo, 1992. 877., GARDOCKI, L.: "Über den Begriff des internationalen Strafrechts" (aus dem Polnischen übersetzt von Georg Ziegler) *ZStW* Band 98. 1986, Heft 3. 703., WIENER: *Nemzetközi büntetőjog, op. cit.* 159.

This report does not aim to provide a comprehensive history of theories in this field of law because it would be impossible regarding the character of this report and unnecessary concerning the purpose of the examination which is to provide the necessary terminological and conceptual framework for the further research on the related topics.

I. The Historical Evolution of the Notion

In this part I shall examine what impact the developments[3] of the legal material in the borderland of public international law and criminal law had on the creation of the concept(s).

1. The traditional notion

The term "international criminal law" traditionally (in the 19th century and in the beginning of the 20th century) included those rules of the domestic criminal law which regulate the application of the national criminal code concerning cases including foreign elements. The questions of extradition and mutual legal assistance and the crimes which (should be) penalised in accordance with multilateral conventions were also *touched* upon by the authors who followed this conceptualization.[4]

According to *e.g. Welzel* the rules of national jurisdiction deceptively named as international criminal law (*internationales Strafrecht*), because they do not belong to public international, but to the national law.[5]

2. The strict terminological distinction

Already at the end of the 19th century *(Beling)* but rather in the 1920's and 1930's *(Pella, Donnedieu de Vabres)* there were several abortive scientific *attempts* to elaborate a form of direct criminal liability under public international

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3 Recently, as Professor *Lahti* points out, "[...] we can see the strong development of international criminal law and the increase of importance of the UN's activities in global criminal policy taking place at the same time as the regional strengthening of similar tendencies, *e.g.* on the European level." LAHTI, R.: "Toward an International and European Criminal Policy" in: *Liber Amicorum Bengt Broms.* Celebrating His 70th Birthday 16 October 1999. (ed. Tupamäki Matti), Helsinki, 1999. 223.

4 GARDOCKI: *op. cit.* 704–705.

5 WELZEL, H.: *Das Deutsche Strafrecht.* Elfte neubearbeitete und erweiterte Auflage, Berlin, 26.

law and to establish an international criminal court. To *emphasise* the novelty of the proposed rules of public international law, the authors did not use the old term ("international criminal law"), but created several new ones to designate this futuristic field of law (*e.g. Beling: Völkerstrafrecht*, in the French-speaking literature *Donnedieu de Vabres: droit international pénal*).[6] After the second world war the above mentioned proposals were partly *realised* [see the judgements of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (hereinafter: IMT)] and this movement strengthened the tendency to separate the newly emerged rules from the traditional scope of international criminal law. This approach is marked by the name of *Jescheck* and his monograph published in 1952.[7] I will review his conceptualisation as set forth in the last edition of his famous text-book written together with *Weigend*.[8]

Jescheck and *Weigend* use a restricted (traditional) notion of (1) "international criminal law" (*internationales Strafrecht*) [they also designate it as "the international applicability" (*der internationale Geltungsbereich*) of criminal law].[9] This notion regulates two questions. (a) The first one is whether a statement of facts (*Sachverhalt*), which contains an international element concerning the nationality of the perpetrator or of the injured person or the foreign place of perpetration, is situated under domestic jurisdiction (*Strafgewalt*). (b) The second question is whether this statement of facts will be judged by the court of this state in accordance with its own or an other national criminal law. [With respect to the second the international criminal law is regarded as "law of conflicts" (*Kollisionsrecht*), like private international law.][10] (1a) Although they treat "European criminal law" (*Europäisches Strafrecht*) under the heading of "international applicability", this constitutes a rather independent part and possibly this is why it is treated as an "Excursus".[11] Regarding this field of law they discuss (a) the scope of activities in the Council of Europe from the impact of the European Convention for the Protection of Human Rights and

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6 GARDOCKI: *op. cit.* 705–710.

7 *Ibid.* 713. note 38.

8 Jescheck in his later publications from 1972 used usually the wide concept of international criminal law, but in the mentioned textbook he maintain to use the traditional distinctions. *Cf.* GARDOCKI: *op. cit.* 713–714. especially 713. note 38.

9 *Cf.* JESCHECK, H.-H.–WEIGEND, Th.: *Lehrbuch des Strafrechts.* 5., vollständig neubearbeitete und erweiterte Auflage. Berlin, 1996, 160., 161., 163.

10 *Ibid.* 163–164. *See ibid.* 164. (with several example of the application of foreign criminal and non-criminal law in criminal cases). *Cf.* note 70.

11 JESCHECK– WEIGEND: *op. cit.* 182.

fundamental Freedoms, Nov. 4, 1950 (hereinafter: ECHR) and its protocols to the treaties concerning various forms of international cooperation in criminal matters concluded under the auspices of this organization, (b) the norms of the European Union which oblige Member States to protect its interests by their penal law, administrative penal law or mere administrative law or authorise the Union to impose administrative (penal) sanctions.[12] (2) They discuss the privileges based on public international law (*völkerrechtlichen Privilegen*)[13] under the heading "personal applicability" of the German criminal law (together with those which stem from the constitutional law) and separated from the notion of international criminal law (international applicability).[14] (3) *Jescheck* and *Weigend* distinguish between and treat separately the notion of international criminal law and the concept of "Penal law of the nations" (*Völkerstrafrecht*),[15] whose existence presume: (a) "direct criminal responsibility of individuals under public international law" (b) "supremacy of public international law over domestic law" (c) "exclusion of the doctrine 'act of state'" (*Ausschluß der "Theorie der Hoheitsakte"*).[16] (4) The text-book also deals with the "limits of domestic jurisdiction set by public international law" (*völkerrechtliche Schranke der staatlichen Strafgewalt*) in connection with the general notion of domestic jurisdiction (*Strafgewalt*). Within this complex of problems the authors distinguish between (a) rules which are recognised in the great majority of the states (*e.g.* the prohibition of inhumane treatment of prisoners of war, the requirement to provide an interpreter if the accused does not speak the language of the court to a sufficient extent, the principle of speciality as a condition of extradition), and (b) norms which come from treaties [*e.g.* the International Covenant on Civil and Political Rights, Dec. 19, 1966. (hereinafter: ICPR)] and shall be transformed into the domestic law.[17] (5) Jescheck and Weigend use term "supranational jurisdiction" and in their opinion only the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former

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12 *Ibid.* 182–186.

13 *Ibid.* 189–190.

14 *Ibid.* 186–190.

15 *Ibid.* 116–125.

16 *Ibid.* 123–124.

17 *Ibid.* 10–13. We should mention that the norms of public international law which recognised in the great majority of the states [*Cf.* (4/a)] are also incorporated in treaties [*Cf.* (4/b)] (*e.g.* 1949 Geneva Convention I., European Convention for the Protection of Human Rights and Fundamental Freedoms).

Yugoslavia since 1991 (hereinafter: ICTY) can be deemed to have such competence.[18]

I should point out that they not only strictly distinguish between "international criminal law" and "penal law of the nations" but also treat separately those other questions of criminal law which are connected with foreign legal or factual elements. This text-book deals with the problem of extradition only to necessary extent [*e.g.* concerning the principle of the vicarious administration of justice (*stellvertretende Strafrechtspflege*)],[19] but this approach can be attributed to the nature of the book, namely that it only concerns substantive criminal law.

The use of separate notions is also recognised and followed in the Hungarian literature by Professor *Wiener*. In his early works he does not detach himself from the traditional notion[20] of (1) "international criminal law" which relates to the international legal aspects of the domestic (whether substantive or procedural) law and constitute by chance a separate part of it. Its purpose is the facilitation of cooperation between states in the fight against crime.[21] This notion contains (a) obligations—assumed by the state in international conventions—to penalise certain types of conduct,[22] (b) the substantial and procedural rules regarding the implementation of the principle of *aut dedere aut punire* (jurisdiction, extradition, transfer of criminal proceedings, execution of a foreign judgement),[23] and (c) other types of cooperation in criminal matters (e.g. procedural actions, judicial assistance) which are not included in the former point.[24] Professor Wiener distinguishes quite sharply this notion from the

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18 *ibid.* 12. According to them neither the International Military Tribunal at Nuremberg [*ibid.*, 12.] nor the institutions of the EU [*ibid.*, 184.] have supranational jurisdiction. The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between January 1994 and 31 December 1994. (hereinafter: ICTR) has similar authority as the ICTY.

19 *Ibid.* 168. note 32., 175.

20 *Cf.* WIENER: *Nemzetközi büntetőjog, op. cit.* 165.

21 *Ibid.* 169.

22 *Ibid.* 169.

23 *Ibid.* 169–170. This is the ancient expression to the principle, which is called "aut dedere aut judicare" according to Bassiouni's terminology [*Cf.* BASSIOUNI, Ch. M.: "The Sources and Content of International Criminal Law: A Theoretical Framework" in: *International Criminal Law*, op. cit. 114.].

24 WIENER: *Nemzetközi büntetőjog, op. cit.* 169–170.

concept of (2) "Penal International Law" ("Penal law of the nations"), which is similar to public international law[25] and contains the substantive and procedural rules concerning the notion of international crimes,[26] *i.e.* types of acts which are penalised by a resolution of an international organ, and judged by an international body, if such an institution exists.[27]

3. The united concepts

Other authors include the latest developments (direct responsibility under public international law, even European criminal law) in the notion of international criminal law.

According to *Makarov* "under international criminal law can refer to two groups of legal norms: the provisions of public international law (take up a place above the states) with penal content [also named as "Penal law of the nations" (*'Völkerstrafrecht'*)] on the one hand and the norms of the domestic law establishing the enforcing range (*'Anwendungsbereich'*) of the domestic criminal law or—under certain preliminary condition, the foreign criminal law on the other. These latter rules also regulate the conflicts of laws and are treated as a counterpart of the international private law".[28]

According to Professor *Nagy* the present concept of international criminal law comprises two groups of rules. (1) The *first* one (the so called transnational penal law) is identical with the *traditional* concept of international criminal law (as viewed in the first half of the 20th century) and encompasses the provisions of the domestic criminal law on *e.g.* jurisdiction, recognition of foreign judgements inland, cooperation in the fight against crime connected with the ascertaining of individual criminal responsibility by national courts. These rules can be regarded as the general part of international criminal law. The *second* part (consisting of provisions included in the notion of international criminal law only after the Second World War) is related to the rules of public international law concerning those international crimes (*e.g.* war crimes) whose perpetration

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25 However, he does not want to take a stand on which field of law international criminal law belongs to. *Ibid.* 172.

26 *Ibid.* 169.

27 *Ibid.* 170-172. *See also* BÁN T.—WIENER A. I.: "Hungary. National report" *International Review of Penal Law* Vol. 60. 1989, Nos 1–2. 336., 337., 338., 339.

28 MAKAROV, A. N.: "Betrachtungen zum internationalen Strafrecht" in: *Tübinger Festschrift für Eduard Kern* (Herausgegeben unter rechtswissenschaftlichen Abteilung der Rechts- und Wirtschaftswissenschaftlichen Fakultät Universität Tübingen), Tübingen, 1986, 253.

imposes direct criminal liability on the individual (without any reference to the domestic law). This criminal responsibility is established by international criminal courts or by states. Professor *Nagy* considers these rules as to be the special part of international criminal law.[29] The problem and the disputed existence of "European criminal law" is treated separately (under a separate heading), but following the notion of international criminal law.[30]

I strongly disagree with the use of the terms "general and special part" in this context. (1) The different character of these two fields of law hinder such a conceptualisation. The questions which are regulated by the norms of the so called general part mainly concern the criminal procedure (*e.g.* the transfer of proceedings) and the execution of sentences (*e.g.* transfer of prisoners), whereas the rules of the so called special part are *substantive* ones. If we project Professor *Nagy*'s conceptualisation to the level of domestic law, we get a surprising result: the Code of Criminal Procedure and the law on the execution of sentences constitute the general part of the national criminal law whose special part is the (substantive) Penal Code. This result becomes more absurd if we notice that our so called special part as any other substantive criminal law from the middle of the XVIII. century[31] also has its traditional and recognised general and special part. (2) Some of the so called general part norms of this concept (*e.g.* those which regulate the national jurisdiction) are never applied in connection with any of the special part norms. It becomes obvious if an international court (*e.g.* the ICTY/ICTR) judges a case in accordance with the customary public international law within the competence provided by its Statute (ICTY/ICTR Art 1–8/1–7.). The situation is the same if the national court brings directly the public international law into operation to ascertain someone's criminal responsibility, because the jurisdiction is also based on the international law.[32] The setting is different, however, if the national court brings a decision in accordance with those rules of its domestic substantive criminal law those penalise crimes for which the perpetrator is

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29 TOKAJI G.–NAGY F.: "Jogszabálytan" (Theory of Statutes) in: *A magyar büntetőjog általános része* (ed. Nagy Ferenc), Budapest, 1998, 83–84.

30 *Ibid.* 94.

31 Concerning the general and special part in the national criminal law: JESCHECK–WEIGEND: *op. cit.* 18–19.

32 *Cf.* WIENER A. I.: *"Büntetőpolitika – büntetőjog (jogszabálytan)"* in: *Büntetendőség, büntethetőség* [Criminal policy criminal law (Theoroy of Statutes)]. Büntetőjogi tanulmányok (ed.: Wiener A. Imre), Budapest, 1999, 61.

otherwise directly responsible under public international law,[33] because in this case the applied rules of jurisdiction are also national ones, even if they are based on the universality principle.[34] (3) Some rules of the so-called general part (*e.g.* those regulating international cooperation in criminal matters) are applied not only to the crimes defined in the so-called general part, but also to any actual violation of an internal provison when the case has an international element (*e.g.* the perpetrator escaped to another country, and his extradition is requested). The general part is an abstraction from the special part, its application cannot transcend the range of *its* special part. (Inversely it is possible that some rules of the general part concern not all, but only most of these rules of the special part.) It is absurd that these so called general part norms can be applied without their special part.

Professor *Oehler* uses a quite broad notion of international criminal law (*internationales Strafrecht*). According to his monograph this comprises "all norms which establish, enforce or hinder the penal claim of the state (*Strafanspruch*) and which result from or are connected with conditions among or above the states",[35] namely (a) "regulations which determine the field of application of national criminal law" (*Strafanwendungsrecht*)[36] (including the "law of application of criminal law to soldiers abroad");[37] (b) "substantive international criminal law" (*Materielles internationales Strafrecht*)[38] that "provide protection for the interest (*Rechtsgüter*) that belong to several States together or to the whole humankind."[39] This concept is wider than the notion of (*Völkerstrafrecht*), because the former does not only include "piracy, war crimes, the crimes emerging after the first and the second World War", but also "the crimes defined in treaties between the prevailing treaty-partners". Moreover in his opinion the term of "*Völkerstrafrecht*" is deceptive, because it gives the false impression that a unified and all-embracing operative criminal law exists in the framework of

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33 *Cf.* point (5) of Gardocki's classification. *See* also Hungarian Penal Code (hereinafter: PC) Chapter XI.

34 *See* Hugarian PC § 4. paragraph (1) point c) phrase I.

35 OEHLER: *Internationales Strafrecht, op. cit.* 6.

36 *Ibid.* 1–2. For the translation of the terminology in his monograph concerning the denomination of the part of international criminal law we have taken over the expressions of his later article [OEHLER: *Criminal Law, International, op. cit.*]. *Cf.,* note 42.

37 OEHLER: *Internationales Strafrecht, op. cit.* 2.

38 *Ibid.* 2–4.

39 *Ibid.* 2.

public international law.[40] (c) "Supranational criminal law" (*supranationales Strafrecht*)[41]; (d) The "law of mutual assistance in criminal matters" (*Rechtshilferecht*).[42]

In our opinion *Oehler*'s term "substantive international criminal law" is *not the appropriate phrase*. On the one hand it fallaciously suggests that the other part of *Oehler*'s concept of international criminal law does not contain substantive rules, although it is manifest and recognised that the rules concerning national jurisdiction partly belong to substantive criminal law.[43] On the other hand there are several special procedural and organisational questions (*e.g.* the efforts concerning the establishment of international criminal institutions) which cannot be separated from the really substantive ones. It can lead to misunderstandings, if somebody (like *Oehler*[44]) deals with the former (non-substantive) questions under the heading "*substantive* international criminal law". He probably noticed this problem, and in the later parts of his monograph tried to surmount it by using very laboured headings: *e.g.* "Substantive international criminal law *and* its administration of justice" *(Materielles inter-*

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40 *Ibid.* 4. "Oehler [...] rejects the concepts 'Völkerstrafrecht' as misleading and prefers the exclusive use of the term '(Materielles) Internationales Strafrecht'." WILKITZKI, P.: "Federal Republic of Germany. National Report." *International Review of Penal Law* Vol. 60. 1989, N^{os} 1–2., 263. However it can result in misunderstandings that Oehler use the term "Penal law of the nations" *(Völkerstrafrecht)* as the synonym with "substantive international criminal law" *(Materielles internationales Strafrecht)*, *e.g.* he put the former expression into parentheses behind the latter one in the headings of his monograph. [OEHLER: *Internationales Strafrecht, op. cit.* 2. and 605.] This can be why Wiener alleges that Oehler uses these two concept synonymous. [WIENER: *Nemzetközi büntetőjog, op. cit.* 166.]

41 OEHLER: *Internationales Strafrecht, op. cit.* 4.

42 *Ibid.* 4–6. According to his article in the Encyclopedia of Public International Law the notion of international criminal law comprises the same range of rules, but these were dissected to five part, the "law of application of criminal law to soldiers abroad" was separated from the "regulations which determine the field of application of national criminal law" OEHLER: *Criminal Law, International, op. cit.* 877–878.

43 *See* JESCHECK–WEIGEND: *op. cit.* 165. ESER, A.– LAGODNY, O.: "Preface" in: *Principles and Procedures for a New Transnational Criminal Law* (eds.: A. Eser and O. Lagodny), Freiburg im Breisgau, 1992. v. The substantive or procedural nature of this rules *can* be important from the scope of the principle *nullum crimen sine lege*. *See* Van den WYNGAERT, Ch.: "Belgium. National Report" *International Review of Penal Law* Vol. 60. 1989, N^{os} 1–2. 153-154., 157-158. This question has arisen in the quite famous Finta-case (R. v. Finta [1994] http://www.lexum.unmontreal.ca/csccc/en/pub/11994/voll/html/1994scrl 0701.html) which regrettably has Hungarian connections.

44 *Cf.* OEHLER: *Internationales Strafrecht, op. cit.* 9.

nationales Strafrecht (Völkerstrafrecht) und dessen Gerichtsbarkeit).[45] This expression, however, suggests that the procedural and organisational questions do not belong to the notion of (substantial) international criminal law. This second approach shows that *Oehler*'s notion cannot provide the necessary framework for the examination of connected problems and questions. It is not accidental that several notion of other authors which are more or less parallel with *Oehler*'s "substantive international criminal law" do not only contain substantial rules, but also procedural ones, *cf. Bassiouni*'s "penal aspect of international law",[46] *Naucke*'s "Penal law of the nations" [*Völkerstrafrecht*],[47] *Wiener*'s "Penal International Law"[48] or Eser's *Lagodny*'s and *Scholten*'s "Supranational criminal law".[49] It is worth mentioning, that the use of these two inconsistent approaches in one monograph leave finally in obscurity whether the procedural and organisational norms (proposals) constitute a part of the international criminal law or they are just connected with a (substantial) part of it.

Bassiouni uses a very broad concept of international criminal law, which has two parts: (1) "The penal and procedural aspects of international law", which (a) establish, through conventions, custom and general principles, international crimes, and identify elements of criminal responsibility", (b) "have also increasingly dealt with procedural and enforcement modalities", and "also cover theories of criminal jurisdiction and their ranking".[50] (2) "The international procedural aspects of national criminal law", which include (a) "extraterritorial jurisdiction" and (b) "modalities of inter state cooperation in penal matters".[51]

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45 *Ibid.* 605. *(italics added – M. H.)* "Substantive international criminal law (of the nations) *and* the International Criminal Court" [Materielles internationales (Völker-) Strafrecht und Internationales Strafgericht)], *ibid.* 26. *(italics added – M. H.).*

46 "The penal aspect of international law have also increasingly dealt with procedural and enforcement modalities", BASSIOUNI: *op. cit.* 9.

47 NAUCKE, W.: *Strafrecht.* Eine Einführung, Neunte, überarbeitete Auflage, Neuwied und Kriftel, 2000, 145.

48 *Cf.* WIENER: *Nemzetközi büntetőjog, op. cit.* 169.

49 ESER–LAGODNY: *op. cit.* vi., SCHOLTEN, H.-J.: *Das Erfordernis der Tatortstrafbarkeit in § 7 StGB.* Freiburg im Breisgau, 1995, 14–15.

50 BASSIOUNI: *op. cit.* 8–9.

51 *Ibid.* 9.

4. The latest developments

Recently most authors have tried (a) to leave the strict use of concepts or (b) to create new notions (and include the old expression partly changed or restricted content into a new one) to react to the changes in the legal material or possibly to cope with the confusion which is connected with the term international criminal law and requires permanent explanation.

a. The relativisation of the old notion and the lack of a new one (Naucke's internationalisation of criminal law)

Under the heading "internationalisation of criminal law: basic notions" *(Internationalisierung des Strafrechts: Grundbegriffe) Naucke* deals with:[52] (a) The "so-called international criminal law" *(sog. internationales Strafrecht), i.e.* the range of the criminal law of the Federal Republic of Germany (§§ 3–7. of the German PC).[53] (b) The international and regional (European) minimal standards of criminal law (*e.g.* ICPR; ECHR; U.N. Standard Minimum Rules for the Treatment of Prisoners E.S.C. Res. 663 (XXIV), 31 July 1957.), which set the limits of the national criminal law.[54] (c) The rules concerning "international fight against crime" (*Internationale Verbrechenbekämpfung*, related to (ca) the Interpol, the Europol, the system of Schengen, and (cb) the procedure concerning the execution of sentences and the transfer of sentenced persons *(stellvertretende Strafvollstreckung).*[55] (d) The "European law of Crimes and Regulatory Offences" *(Europäisches Straf- und Ordnungswidrigkeitenrecht).*[56] (e) The "Penal law of the nations" *(Völkerstrafrecht)*, which is partly *substantive* criminal law whose commands and prohibitions are valid all over the world; *procedural* criminal law which could be accepted throughout the world ; and the *organization* of a Criminal Court, which everywhere is recognised.[57]

b. The birth of the new comprehensive notion: Eser's and Lagodny's transnational criminal law

Eser and *Lagodny* use the notion of "transnational criminal law [...], as criminal law (either substantive or procedural criminal law) that is not completely

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52 NAUCKE: *op. cit.* 138.
53 *Ibid.* 138–139.
54 *Ibid.* 139–140.
55 *Ibid.* 140–142.
56 *Ibid.* 142–145.
57 *Ibid.* 145–146.

confined to a single national entity". "A *case* may contain a transnational element on any one of three levels:"[58] (a) "[T]he *national level*" deals with *e.g.* the problem of "the expansion of the extraterritorial jurisdiction both to prescribe rules of substantive criminal law and to enforce them across borders".[59] (b) "[T]he *inter-national* level" comprises "the devices of international cooperation in criminal matters, such as extradition and mutual assistance", which are designed and used "to overcome procedural barriers (for instance, in cases where the perpetrator has fled beyond the border or where evidence has to be gathered from abroad)".[60] (c) "[T]he *supra-national* level" connected with "establishing a code of substantive criminal law as well as a criminal court" which is "independent of national jurisdiction".[61] The term "transnational criminal law" was deliberately chosen in order to emphasise that the more usual term "international criminal law" reflects only one part of a larger system of regulation.[62]

Scholten follows the concept of transnational criminal law (*Transnationales Strafrecht*) used by *Eser* and *Lagodny*, but tries to define it not only in the negative way, but also in a positive manner. In his opinion the notion, as a collective term, comprises fields of criminal law (*Strafrechtsgebiete*) which are related to the fight against "transnational crime" (*transnationaler Verbrechen*).[63] The recognised parts of transnational criminal law are the following: (a) The "rules of the applicability" (*Geltungsbereichsrecht*), which regulate (aa) the preliminary conditions and limits of the jurisdiction of the state (*Strafgewaltsrecht*), *i.e.* to what extent the sovereign has the right (or obligation) to prohibit and to punish acts committed even extraterritorially, and (ab) the possibility of the application of foreign law (*Strafanwendungsrecht*).[64] (b) "International cooperation in criminal matters" (*Internationale Zusammenarbeit in Strafsachen*) which includes (ba) the "international assistance in criminal matters" (*Internationale Rechtshilfe in Strafsachen*), *e.g.* extradition, transfer of criminal proceedings (the procedural aspect), and (bb) the "[i]nternational obligations to purse a perpetrator" (*Internationale Strafverfolgungspflichten*) which means the

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58 ESER LAGODNY: *op. cit.* v.

59 *Ibid.* v.

60 *Ibid.* v.

61 *Ibid.* vi.

62 *Ibid.* v.

63 SCHOLTEN: *op. cit.* 7–9.

64 *Ibid.* 9–12. The more apply the national courts foreign criminal law [*See, e.g.*, WIENER: *Büntetőpolitika, op. cit.* 47.], the more important is the distinction between »Strafgewaltsrecht« und »Strafanwendungsrecht«.

unification of the definition of crimes by treaties attempting to facilitate international assistance and to protect the position of the accused.[65] (c) "Supranational criminal law" (*Supranationales Strafrecht*) is placed above the level of states and is independent from their legislation. In this field of law two components can be distinguished: (a) the material one means the definitions of crimes which jeopardise the legal order of a community of nations or the peace of the world (b) The formal component connected with (the efforts for establishing) international criminal institutions whose task is to enforce and apply the above [under a)] mentioned definitions of crimes. Supranational criminal law exist (*i*) at the level of the public international law, this part is the "Penal law of the nations" (*Völkerstrafrecht*) and operates all over the world, and also (ii) at the regional level which in Finland, Estonia and Hungary means the "European criminal law" (*Europäisches Strafrecht*) that according to the author related only to the European Union.[66] Scholten observe that the above enumerated "fields of the transnational criminal law do not stand unrelated side by side. They influence each other mutually."[67]

II. Survey on the Meanings (Possibly Scope) of the International Criminal Law

According to *Swarzenberger* the term "'International Criminal Law' [...] is now used in at least six different meanings"[68] (1) The first is "the territorial scope of the domestic criminal law".[69] The related provisions "belong[...] not to international but to domestic law", however, they "may [...] be incorporated into a treaty and thus become rules of international conventional law". This "terminology was widely accepted in nineteenth-century Continental doctrine".[70] (2) The second meaning is "internationally prescribed domestic criminal law"[71] that "refers to instances in which a State is bound under international law to visit upon acts of individuals the sanctions of its own domestic criminal law."[72] Obliga-

65 SCHOLTEN: *op. cit.* 12–14.
66 *Ibid.* 14–28.
67 *Ibid.* 28. *See* point III.
68 SCHWARZENBERGER: *op. cit.* 4.
69 *Ibid.* 5–6.
70 *Ibid.* 6.
71 *Ibid.* 6–8.
72 *Ibid.* 6.

tions of this kind may arise (a) from treaties (*e.g.* "piracy" or "slave trading") or (b) from duties of States under international customary law (*e.g.* "infringements of the rights of ambassadors").[73] (3) The third meaning is the "internationally authorised domestic criminal law".[74] Considering (a) *piracy iure gentium* the states are not only "under an international *obligation* to suppress piracy *within* [*their*] *own territorial jurisdiction*", "with the assistance of [their] domestic criminal law, such law may be considered to be internationally prescribed" [*Cf.* point (2)], but are also "*authorised* to assume jurisdiction *on the high seas* over pirate ships".[75] Respecting (b) *war crimes every belligerent* State is under the international obligation to punish the violation of the rules of warfare on the part of its armed forces, "[t]o this extent the law of war crimes embodies internationally prescribed rules of domestic law" [*Cf.* point (2)].[76] If members of armed forces transgress the rules of warfare and happen to fall into the enemy's hands the enemy State[77] is authorised to exercise over them extraordinary jurisdiction limited by international standards.[78] (4) The fourth meaning is "domestic criminal law common to civilised nations". The offences covered by this category "either belong to the category of domestic criminal law which is prescribed by international law" (*e.g.* the civilised regulation of common offences against life, liberty or property) or "they are principles of domestic criminal law which civilised States have de facto in common or consider it opportune to assimilate to a common standard by means of international conventions or by parallel domestic legislation" (*e.g.* forgery of foreign coins or banknotes).[79] (5) The fifth meaning is "international co-operation in the administration of domestic criminal justice."[80] (6) The sixth is "[i]nternational criminal law in the material sense of

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73 *Ibid.* 6–7. This category must be distinguished from cases when (a) the cause of domestic protection of the status of a country as a neutral power through domestic statutes of a penal character is only the convenience and the claim to the demonstration of the international bona fides, and from (b) the notion of "domestic law [...] required by international comity" (*e.g.* "against acts likely to discredit the good repute of sovereigns and other dignitaries of foreign states"). *Ibid.* 8.

74 *Ibid.* 8–10.

75 *Ibid.* 9. *(italics added – H. M.).*

76 *Ibid.* 9.

77 Swarzenberger has not made clear that whether any enemy state, any belligerent state or any other state has extraordinary jurisdiction in these cases. *Cf. ibid.* 10., 31.

78 *Ibid.* 9–10. See also *ibid.* 31.

79 *Ibid.* 10-11. This category is connected with the term "offences against the law of nations" which is used in the Constitution of the United States. *Ibid.* 10.

80 *Ibid.* 11–12.

word".[81] The rules germane to this notion "must be of a *prohibitive character* and be endowed with specifically *penal sanctions*" *Swarzenberger* observes that in "any other (*i.e.* non-material) sense this term is merely a loose and misleading label for topics which comprise anything but international criminal law".[82] In his opinion such real "international law has not *yet* [in 1950] evolved a branch of criminal law of its own",[83] because it has several unrealised preliminary conditions in the international society, politics and law,[84] and he could regard this notion only as a category (a "proposal") *de lege ferenda*.[85]

According to *Wise*: "[i]n its widest, most commodious sense, international criminal law includes three broad sets of topics. The term also has been used more restrictively to refer one or another of three sets of topics standing alone. [...] (1) The first group of topics concerns the power which courts of a particular state may exercise in criminal cases involving a foreign element. It includes questions of jurisdiction over crime, recognition of foreign penal judgments, and forms of cooperation [...]. This part of the subject comprises international criminal law more or less in the original meaning of the term. (2) The second group of [...] topics concerns international standards of criminal justice, *i.e.* those rules or principles of public international law which impose obligations on states with regard to the content of their national criminal law or procedure. Such standards are of two kinds of, requiring states as a matter of international obligation either (a) to respect the rights of persons accused or suspected of crime, or (b) to prosecute and punish certain 'international offenses.' [...] (3) The third group of topics concerns international criminal law *stricto sensu*—the rules pertaining to conduct that violates penal prohibitions directly imposed on individuals by public international law."[86]

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81 *Ibid.* 13–14. He also uses the term: "international criminal law in any proper sense". *Ibid.*, 16., and mentions: "international criminal law *stricto sensu*". *Ibid.* 35. note 74.

82 *Ibid.* 14., See also *ibid.* 13.

83 *Ibid.* 33. *(italics added – M. H.)* See also *ibid.* 35. The position is still, as it was summed up by the Committee on the Permanent Court of International Justice of the First Assembly of the League of Nations in 1920: 'There is not yet any international penal law recognised by all nations.' *Ibid.* 23.

84 *Ibid.* 35–36.

85 *Ibid.* 33–36. Regarding especially that some states are "in law [...] privileged position". *Ibid.* 35. [*Cf.* Art 23. par. 1. second sentence and Art 27. par. 3. first sentence of the of UN Charter] and "immune to the application of collective enforcement measures" [Chapter VII. especially Arts 39-42. of the UN Charter].

86 WISE: *op. cit.* 284–285.

According to *Gardocki* "When analysing the various definitions, we have to face the following fields of problems of criminal law and respective legal norms which at least according to one of the definitions were or are included in the sphere of international criminal law": (1) "Norms of (national) criminal law which [...] concern [its] range of application." (2) "Norms of (national) criminal law and bi- and multilateral treaties regarding extradition, mutual legal assistance and certain new forms of international cooperation in criminal maters (transfer of criminal proceedings, recognition of foreign penal judgements)." (3) "Norms of public international law included in multilateral treaties and concerning certain crimes which are regarded as '*delicta iuris gentium*'". These treaties oblige the states first of all to penalise these crimes and to [...] cooperate in the fight against them". (4) "Norms of public international treaty- and customary law on the responsibility for crimes under public international law, *i.e.* crimes against peace, war crimes, and crimes against humanity [so-called Nuremberg-law]." (5) "Norms of national criminal law on the responsibility for crimes against peace, war crimes, and crimes against humanity." (6) "Norms of public international law, included in multilateral treaties concerning human rights, ascertaining standards in the field of substantive and procedural criminal law, which the states by their legislation should observe."[87]

III. The Connections between the Discussed Fields of International Criminal Law *Sensu Largo*

As we have seen the traditional and the narrowest notion of international criminal law means the rules of the national jurisdiction.

The connection between the rules of jurisdiction and extradition is "direct and evident". If every perpetrator (could) be extradited to the state in the territory of which his crime was committed or whose interests (*Rechtsgüter*) his act injured, the execution of the extraterritorial jurisdiction would be insufficient. However, for the cases in which the extradition of the perpetrator is excluded, should the legislator establish a rule which authorises the national procedure because of acts committed in a foreign territory.[88] It is manifest if

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87 GARDOCKI: *op. cit.* 703–704.

88 SCHOLTEN: *op. cit.* 29. *See also* GARDOCKI: *op. cit.* 705. The "differentiation in the basic concepts of the rules of jurisdiction result in a significant consequence for the law of extradition: the continental states can accept the principle of the non-extradition of their nationals [Art 16. II. 1. of the (German) Constitution (*Grundgesetz*)], because they fundamentally extend their

we examine the principle of the vicarious administration of justice whose application is—in the German criminal law (*cf.* German PC § 7. II. Nr. 1–2.). explicitly—secondary compared to the extradition.[89] The relationship between the jurisdictional provisions and the rules on other forms of international cooperation is not so direct, but the enforcement of the penal claim of the state (*Strafanspruch*) concerning acts committed in foreign territory is usually reduced to foreign help provided for the investigation or the proof.[90] Furthermore if any other form of international cooperation in criminal matters is not at all connected to the principles of jurisdiction, it should relate to the other modalities. This statement is based on the one hand on the existence of the quite comprehensive "general part" of the national laws which regulate the various forms of international cooperation in criminal matters [*Cf.* Act XXXVIII of 1996 (in Hungary) on international judicial assistance (hereinafter: Act on jud. assist.) §§ 1–10., 76.], and on the other hand, on the efforts made in the framework of the Council of Europe to create a single European convention which would provide for the integrated regulation of this field of law.[91] Thus it is indispensable that the notion of international criminal law comprise the rules concerning all forms of international cooperation in criminal matters.[92]

The application of several rules of international cooperation[93] (and some provisions concerning jurisdiction) presumes the so-called "double criminality", *i.e.* the act should be penalised in both country. To fulfil this precondition and

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jurisdiction to the acts committed abroad, while the states in the English-speaking world approve of the extradition of their nationals, since they leave the crimes committed in foreign territory unpunished." JESCHECK–WEIGEND: *op. cit.* 168. and note 32. However, the necessity of the extraterritorial jurisdiction can be justified even if the extradition is otherwise possible (*e.g.* the protective principle crimes related to the crimes against the state).

89 SCHOLTEN: *op. cit.* 29. *See also* WIENER: *Büntetőpolitika, op. cit.* 74.

90 SCHOLTEN: *op. cit.* 29.

91 *See* WIENER: *Büntetőpolitika, op. cit.* 53. note 55. This so called "integrated approach" is strongly suggested by BASSIOUNI: *op. cit.* 116., 117.

92 "Those who use the term international criminal law [...] in the meaning of the territorial scope of [...] criminal law, usually deal under this heading, too, with extradition treaties and other conventions by which States assist each other in the administration of criminal justice." SWARZENBERGER: *op. cit.* 11–12.

93 According to the Hungarian law: the extradition, the transfer of proceeding, the transfer of sentenced persons, the denunciation to foreign state, and - in the lack of reciprocity—the mutual assistance in criminal proceedings [*Cf.* Act on jud. assist. § 5. par. (1) point a) and § 62.].

also to otherwise facilitate the cooperation it is typical that states concluded treaties in which they undertook to penalise certain types of conduct.[94] In so far as a multilateral treaty is concluded mainly to facilitate the fight against a more or less new form of crime (criminal phenomenon) which extends over the borders by providing a unified penal provision, it should contain special rules concerning jurisdiction and usually provides for exceptional (and more efficient) possibilities or means regarding cooperation. (This group of crimes is deemed as a special group of domestic offences from the point of jurisdiction, *cf.* Hungarian PC Art 4. par (1) point c) phrase II.)[95] Other types of international conventions which concern human rights (*e.g.* the ECHR) and customary international law also oblige states to penalise certain types of human behaviour. Thus it would be advisable to include in the notion of international criminal *law* all the definitions of crimes of domestic law which are based on the prescription of public international law. The *scientific* research should also be extended to those prescriptive rules of public international law which bind the states to introduce penal provisions into their criminal law.

The conventions which require states to penalise certain kinds of conduct (*e.g.* Art V. of the Convention on the Prevention and Punishment of the Crime of Genocide, or the Arts. 49/50/129/146. of the four Geneva Conventions I., II., III., IV.[96]) and the definitions of crimes and related rules of jurisdiction which were introduced into the domestic criminal law to fulfil an international duty

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94 *Cf.* WIENER: *Nemzetközi büntetőjog, op. cit.* 165. "Often the purpose of [...] treaties is not so much to create new rules which national states would not have developed at a national level and without the justification of international law, but rather they are a means of ensuring *international cooperation* between states in order prevent and combat certain forms of behaviour." ORIE, A. M. M. RÜTER C. F.–SCHUTTE, J. E. E. SWART, A. H. J.: "Netherlands. National Report" *International Review of Penal Law* Vol. 60. 1989, N[os] 1-2. 398.

95 This provision "of the Penal Code provides that the scope of Hungarian law extends to offences committed abroad by non-Hungarian citizens if the offence is regulated by an international treaty. In this case the Hungarian law follows the principle of universal punitive power (*principium universale*). [...] However, the principle of universal punitive power is effectuated only if domestic Hungarian law has already declared the particular act to be a criminal offence". BÁN WIENER: *op. cit.* 338.

96 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949. / Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949. / Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949. / Geneva Convention relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949.

[e.g. Hungarian PC § 155. (genocide), § 158 (violence against civilian persons)[97] § 4. par. (1) point c) phrase I. (universality principle)] concern crimes for which the criminal responsibility have *otherwise* been directly recognised under international law. However the precise designation of the source of law on which the individual criminal liability is based is not artificial in these cases,[98] because the distinction can be meaningful and useful, i.e. when the criminal responsibility can only be established under public international law, *e.g.* when at the time of the perpetration (a) the given international convention has not been transformed into the given national law or (b) the general part rules of the applied domestic law provide a justification,[99] an excuse[100] or an other obstacle of the criminal responsibility[101] which relives the perpetrator from criminal responsibility. Notwithstanding the possibility of the meaningful distinction I deem the above mentioned overlap strong enough to include those rules of public international law, which directly establish the individual criminal liability of those who violate them, in the notion of international criminal law.

The criminal responsibility can be ascertained not only by national, but also by international criminal courts.[102] Presently the competence of the ICTY and the ICTR means such criminal jurisdiction. These tribunals decide on the criminal responsibility of individuals directly under customary international law within the limits of their competence (Art 1–8/1–7. of the ICTY/ICTR Statute). It is essential to recognise that the statutes do not criminalise a conduct with

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97 Bán and Wiener concerning international crimes (*stricto sensu*) relate to the Chapter XI. of the Hungarian Penal Code and its several provisions. [BÁN–WIENER: *op. cit.* 342–343., 345.]

98 *Cf.* WIENER: *Nemzetközi büntetőjog, op. cit.* 172.

99 The rule which authorised the frontier-guards to shoot anyone trying to escape from East Germany. *Cf.* LIGETI, K.: "A jogállami büntetőjogról" (Criminal law and the role of law) in: *Büntetendőség, op. cit.* 92–93. The related decision of the German Supreme Court [Bundesgerichtshof (5 StR 370/92. November 3. 1992) (1993) EuGRZ 37.] is reviewed in ECL June 1993 4. [quoted by WIENER: *Büntetőpolitika, op. cit.* 62. and note 71.].

100 *Cf.* GAETA, P.: "The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law" *European Journal of International Law* Vol. 10. 1999, 172–191. regarding the different approaches and similarities in the national law, in the customary international law and in the ICC Statute [Art 33.] concerning the regulation of the question of superior orders and *e.g.* war crimes.

101 *E.g.* the statutory limitation. *Cf.* MOHÁCSI P.–POLT P.: "Estimation of War Crimes and Crimes Against Humanity According to the Decision of the Constitutional Court of Hungary" *International Review of Penal Law* Vol. 67. 1996, N^{os} 1–2. 333–339. concerning the Hungarian experiences.

102 The so called indirect and direct enforcement of the international criminal law according to BASSIOUNI: *op. cit.* 5–7.

partly retroactive effect,[103] but just authorise an international organ to proceed with regard to a conduct which was considered to be a crime according to customary public international law at the time of its perpetration. Those organs also take into account certain national rules of criminal law (*cf.* Art. 24 par 1./Art 23. par 1. of the ICTY/ICTR Statute). The enforcement of sentences is regulated by the national law of the custodian state but under the supervision of the ICTY/ICTR (*cf.* Art 27/26. of the ICTY/ICTR Statute). The domestic law of the state which holds the convicted person in prison is significant with respect to the pardon and commutation of sentences (*cf.* Art 28/27. of the ICTY/ICTR Statute). These institutions do not constitute a fully integrated international criminal justice system,[104] so they should rely upon the help of the states to enforce their decisions by the traditional forms of international cooperation in criminal matters or by means very similar to them (*cf.* Art. 29/28. ICTY/ICTR Statute). So we can see that the rules concerning the international institutions authorised to exercise of criminal jurisdiction have several connections with the already recognised fields of international criminal law.

The international human rights documents do not only oblige the states to provide criminal protection for certain interests, but at the same time circumscribe their jurisdiction. Several human rights requirements are also effective at the international level either in a same way as in the national law [*e.g.* the prohibition of torture (*cf.* Art 7. of the ICPR, Art 3. of the ECHR)] or regarding the characteristics of the public international law [*e.g.* the legality principle *(nullum crimen et nulla poena sine lege)* (*cf.* Art 15. of the ICPR, Art 7. of the ECHR)]. So this inherent connection between the obligation and the prohibition to penalise, which in the examined case arises from the international law, can substantiate that the limits of the domestic jurisdiction stemming from public international law can be handled in the notion of international criminal law.

Among the various rules of the so called European criminal law nearly all types of rules which were recognised above as the fields of international criminal law can be found: the treaties on various forms of judicial cooperation in criminal matters concluded within the Council of Europe, the obligations in the

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103 The ICTY has jurisdiction to judge act committed *after* its establishment. *Cf.* Art 1. and 8. of the ICTY Statute. Concerning its preventive impact *see* SCHOLTEN: *op. cit.* 22. Such role of ICTR is much more restricted. *Cf.* Art 1. and 7. of the ICTR Statute.

104 BASSIOUNI: *op. cit.* 6. The only two historical examples of the "truly 'direct enforcement system' are the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (IMT) and the International Military Tribunals for the Far East (IMTFE)." *Ibid.* See also *ibid.* 6-7.

community law to protect several interests of the European Union with (criminal or administrative) sanction, the authority of the organs of the community to enforce their sanctions with disputed nature, the conventions on human rights at the European level, *etc.* These overlaps can establish that the problems of the European criminal law are treated in or attached to the notion of international criminal law.

Concluding Comments

On the basis of this rather brief summary and the related roughly outlined examination for lack of competence and education regarding this subject I naturally cannot undertake neither to criticise all of the established (or possible) conceptualisations thoroughly nor to create of the new (system of) concept(s) (if the latter is possible at all). However, I have the following remarks:

I disagree with those critics that the use of the attribute of "international" regarding domestic rules of law would be deceptive. Similar terminology can also be found concerning private international law provisions of which partly belong to domestic law. I do not share the objection, that the different nature of international private law and international criminal law—as the former is law of conflicts and the latter prescribes the use of *lex fori*—hinder the above mentioned comparison, because recently the application of foreign criminal law plays a more and more important role,[105] and the civil cases are decided directly on internationally unified norms (*e.g.* law on bill of exchange).[106]

When establishing new terminology it is hard to find a proper phrase, because most terms could already be in use ("reserved") expressing another meaning. It can be well presented by the comparison of Nagy's and Eser's notions. According to Professor Nagy the concept of transnational criminal law comprises the rules belonging to national law and regulating the questions of traditional crimes with foreign elements (*e.g.* the provisions on international cooperation in criminal matters).[107] This field of law constitutes a part of his

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105 *Cf.* WIENER: *Büntetőpolitika, op. cit.* 47., 65.

106 *Cf.* MÁDL F.: "Bevezetés. A nemzetközi személyi és gazdasági forgalom jogi szabályozásáról általában" (Introduction. The regulating of the international passenger traffic and commerce in general) in: *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga.* (ed.: Mádl F.—Vékás L.), Budapest, 1997, 23.

107 TOKAJI—NAGY: *op. cit.* 83–84. *See also* BÁN—WIENER: *op. cit.* 336. concerning the similar use of the attribute of "transnational" regarding the notion of crime compared with and

wide notion of international criminal law. Professor Eser's term of transnational criminal law includes all kinds of (either substantive or procedural) penal rules that are not completely confined to a single national entity. This comprehensive notion comprises international criminal law (*i.e.* rules of international cooperation in criminal matters).[108] Disregarding the old conceptualisations and terms in the course of the establishment of the allegedly new terminology, of which purpose was to avoid the confusion connected with and the permanent explanation required by the old expressions, merely increases the present misunderstandings in the scientific literature.

– As far as I am concerned, I give preference to the use of comprehensive (wide) notion of international criminal law. This concept provides a suitable framework for the discussion of the connected issues, without making the delimitation and separate examination of them impossible.[109] Notwithstanding I do not object the use of separate concepts (without a comprehensive one) if it does not result in neglecting the mutual connections between these notions in the course of the examination. The existence of common questions [especially those regarding the sources of public international law and the principles of criminal law (*nullum crimen/nulla poena sine lege*)] also supports the use of a comprehensive notion of international criminal law, even if the emerging problems require diverse solutions in the various fields of the concept.

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separated from the epithet "international". *See also* TRIFFTERER, O.: "General Report. Part I: Efforts to Recognize and Codify International Crimes" *International Review of Penal Law* Vol. 60. 1989, N^{os} 1–2., 47.

108 ESER–LAGODNY: *op. cit.* v-vi.

109 *Cf.* GARDOCKI: *op. cit.* 718–719.

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1216-2574 / 2000 / USD 5.00

KALEIDOSCOPE

The Transformation of the Constitutional Systems in the Central and Eastern European Countries

(15–16 October, 1999, Prague)

With the above title there was an interesting international conference organised by the Constitutional Law Department of the Faculty of Law (Charles University) (15–16 October, 1999, Prague) about the actual constitutional problems in Central and Eastern European States. The hosts, Prof. Dr. Václav Pavlíček, the head of department and Dr. Věra Jirásková, had invited the lecturers mainly from among Czech and Slovak experts; however a smaller number of Polish, German and Hungarian lawyers were also present at the conference. This decisively determined the territorial extent of the studied issues. Some of the reports spanned the whole region including the post-Soviet states and the Eastern regions of Germany as well; however, most of the lectures focused on the countries of the Visegrád Group. The special topicality of the conference was provided by the recent Czech political crisis, which is to be remedied by some political powers by means of the modification of the constitution. Of course, all of this affected the whole conference and revealed itself mainly in critical comments on the state of affairs in the Czech Republic as well as in passionate debates between the participants and also in the keen interest in the development of the neighbouring states.

The conference was opened by the hosts' lectures (Prof. Dr. Pavlíček and Dr. Jirásková), who tried to describe the basic tendencies of the constitutional development of our region. It is typical–though not at all surprising in the light of the geographical conditions and the historical traditions–that none of them neglected Germany since the Eastern parts of it had also been affected by the

constitutional changes after 1989. According to Prof. Dr. Pavlíček the enactment of constitutions, which was subsequent to the change of regimes, followed a shared, mainly Western European pattern almost everywhere. The new constitutions also had the same ideological basis the idea of human rights, which had been being kept on the agenda by the movements of the dissents in the region for the past few decades. Considering the success of the human and minority rights the membership in the Council of Europe is to be especially emphasised as it affected the transformation of the Central and Western European countries positively. However, underlining the importance of human rights was not the only alternative, since the stormy renascence of the religion and national ideas had taken place after 1989 as well, and it also affected—though not so considerably—the latest constitutions. However, according to Dr. Pavlíček, returning to the pre-war constitutional traditions not always turned out to be an excellent idea, particularly had Czech Republic (see for example either the question of Ministers' responsibility or the presidential rights, which are too many compared to a parliamentary republic). The simultaneous appearance of the new states and the integrational efforts also created an interesting situation. In fact, it meant a really new situation for the Czech Republic, because after the dissolution of Czechoslovakia it became weaker as opposed to Germany, its neighbour of key position. It also weakens the position of the Czech Republic that some of its political elite prefer having interests in the states to having Czech interests, and although there are many politicians in the country, there are only but a few statesmen. At the same time, a considerable number of politicians reject to promote either the introduction of the institutions of direct democracy or the establishment of a new type of forums that would help citizens, such as the ombudsman. Meanwhile the number of voters is decreasing and the distance between politics and people keeps increasing.

Dr. Jirásková's lecture concerned three problematical points: the formal sides of the acceptance of constitutions, the contents of the new constitutions, and the putting of the Central and Eastern European constitutional excitement into European and worldwide context. In most states of the region the new constitutions were adopted by properly elected Parliaments (that is, these Parliaments were not elected directly with the purpose to create constitutions). Countries having acted in a divergent manner include Bulgaria and Romania, where the new basic laws were adopted by constituent national assemblies. However, according to Dr. Jirásková, the region knows imposed constituents as well, of course not in their pure 19th century form. The constitution of Bosnia and Herzegovina can be regarded as the most similar to this since it was forced into the country by the Dayton Agreement. Partially the Russian and mainly the

Belorussian constitutions also belong to this category. The way of adoption of these two constitutions was considerably different from the usual practice. Regarding the contents of the new constitutions, these are not different from the trends dominating in Europe and the world at present. Among many other things the emphasizing of individual rights, the extention of the constitutional regulation and the introduction of institutions, have been more or less unknown in the region, such as ombudsman, court of auditors, judicial self-government, etc., can be regarded as common tendencies of the new constitutions. The future will show how these new constitutions containing these institutions can cope with difficulties in the practice.

The succeeding lectures (Prof. Dr. Pavel Peška, Prof. Dr. František Šamalík and Dr. Karel Vodička) dealt with the general relations but their conclusions focused mainly on the Czech situation. Prof. Dr. Šamalík emphasized the historical and social embeddedment of the constitutions. The "timelessness" of the constitution manifests itself only in the limitation of the state authority. The Czech constitution is an enacted one and it is based on the supreme power of the people and as such it can be mainly connected with the traditions of the French Revolution. The constitutional practices of Great-Britain and the USA can not be suitable models for the Czech Republic since their constitutions and traditions are completely different. The lecturer supported the proportional representation and he warned the political elite not to remedy its powerlessness and immaturity by sacrificing this principle or by turning to the majority system.

It also must be mentioned here that the conference in Prague was held at an interesting point of time. The special topicality of the conference was provided by the Czech political crisis which has been able to be experienced recently. The dominating political forces (the governing social-democrats joined by the so-called oppositional contract and the civil democrats who are theoretically oppositional though in some questions they tend to cooperate with the government) want to remedy this crisis by the amendment of some of the provisions of the constitution and the electoral law. Their main purpose is to alter the originally consistently proportional electoral system so that it would prefer only the two big parties and they also want to modify the extent of the sphere of authority of the president of the republic so that he would have minimal freedom of movement at the formation of the government. Therefore, they wish to record in the constitution the obligation of the president which compels him to charge the representative of a party that has won the most votes with the formation of a government.

Of course, all this affected the whole conference, which could be clearly seen from the critical comments on the states of affairs in the Czech Republic and

also from the vehement debates between the participants. Besides, the lectures on the constitutional development and problems of the neighbouring states aroused the audience's interest. The following programme of the conference was arranged in a way so that it would respond to that interest. Thus the majority of the reports dealing with constitutional problems concerned the constitutional regulation of the parties (Prof. Dr. Eduard Bárány, Dr. Vojtech Šimíček), the role and present state of the constitutional courts (Reader Dr. Vladimír Sládeček, Dr. Zdeněk Kühn, Mgr. Radovan Suchánek), the comparative analysis of the methods of the amendment of constitutions (Dr. Karel Svoboda), the decentralization (Dr. Eugenie von Trützschler), the differentiation of human rights (Prof. Dr. Jiří Boguszak), The success of the principle of the constitutional state (Mgr. Tünde Keszegh) and the confessional law (Dr. Michal Lamperter). Probably the most vehement debate was the one about the constitutional and legal regulation of the parties. The cause of this lies in the duality which is the characteristic of the Central European parties: on the one hand they obtained considerable power and influence over different spheres of life (first of all in the Czech Republic and in Slovakia), but on the other hand they are very unpopular with the people. The most interesting particular question asked that who could control the economy of the parties, and there was another interesting question regarding how it could be avoided that the governing parties would use the state controller authorities so as to "nag" the opposition parties. Prof. Dr. Eduard Bárány, the lecturer, had a suggestion to eliminate this situation: he said that not the state authorities should be the ones that control the parties in this respect but some auditor firms selected by a draw. Of course, the democracy within the parties should also be increased.

A further block was formed by the lectures on the national referendum and the initiatives of the people in Slovakia, Poland and Hungary (Prof. Dr. Jozef Prusák, Reader Dr. Krzystof Skotnicki, Prof. Dr. Dariusz Górecki, Dr. Iván Halász). The lecturers tried to introduce the history of the laws of referendum in their country together with the legal and political problems which have arisen so far. The organizers of the conference devoted such special attention to this topic probably because such things as the institution of the national referendum and the initiatives of the people do not exist in the Czech constitutional system. In the Czech Republic there are vehement political and ideological debates on these institutions of the direct democracy partly between the rightist civil democratic parties, partly between the social democrats and the populists. The rightist civil democrats, who often use the devices of the Common Law legal system, keep aloof from the country wide success of direct democracy and they consider themselves adherents of representational democracy. The debate arising

from this took place between the Czech participants of the conference, the majority of whom agreed in principle with the introduction of the institutions of the direct democracy in the Czech Republic (for example Prof. Dr. Pavlíček, Prof. Dr. Šamalík, Dr. Karel Svoboda, etc.). The expected result of these steps is a considerable weakening of the extreme role of the parties and also a more active political participation of the people. On the other hand, there were other Czech participants warning against exaggerated optimism referring to direct democracy (Dr. Jindriška Syllová). One of the largest lecture blocks was formed by the topic of the planned constitutional amendments, since the question of the modification and completion of the constitution are on the agenda at present both in the Czech Republic and in Slovakia. The main difference between the two countries in this respect is that while this is to remedy the problems of the country in the Czech Republic, in Slovakia the conclusions of the previous four–year governmental period is tried to be drawned. The last term of Vladimír Mečiar drew attention to many of the defects of the Slovak constitution that could not have been remedied under the political circumstances of those days. Today's government coalition, however, has the majority needed for the creation of a constitution and they are keen on taking advantage of this. There might not be a new constitution accepted though, since there is no a consensus on this issue yet, not even within the government coalition. However, a renewal of smaller or bigger scale is almost unavoidable. The first amendment of the constitution has already passed by the legislation; it regulated the position of the head of state in the Slovak constitutional system. This issue was discussed by the lecture of Dr. Dušan Nikodým, while Reader Dr. L'ubor Cibuľka's lecture dealt with the other problems of the Slovak constitution. He pointed out that the most urgent things to do are to regulate and limit the too much parliamentary immunity of the representatives and to introduce the right of the constitutional court that makes its decisions obligatorily executable. The latter problem also arose during the previous term when the majority of the representatives referring to the freedom of conscience and the free mandate, refused to withdraw those of their decisions which had been found anti-constitutional by the constitutional court (the famous Gaulieder case). The constitutional court's filling up based on the rotary principle, the inclusion of the issue of the proportional representative system in the constitution and the responsibility of the Ministers also need careful consideration. The joint lecture of Dr. Ladislav Orosz and Mgr. Andrea Földesová also dealt with the same topic. Besides the foregoing issues they also mentioned the necessity of the establishment of a judicial self-government and the extention of the sphere of authority of the Supreme Control Office.

Dr. Zdeněk Koudelka, Reader Dr. Pavel Mates and Reader Dr. Michal Klíma, the lecturers dealing with the planned amendments of the Czech constitution and suffrage, advised as a rule to the politicians that they should be cautious with the constitutional reforms the aim of which is to solve current problems. Dr. Koudelka found the introduction of a direct presidential election improbable and he also warned against the political effort which wants to compel the president to always charge the representative of the strongest party with the formation of a government. Moreover, the question asking which the strongest party is still remains open. The same cautiousness accompanied with the reports dealing with the probable reforms of the electoral system. It is because in the Czech Republic there is only one point of view—that is the protection of the stability of the homogenous government—which is placed over anything else and this is a rather flourishing attitude. The proportional representative system has traditions in the Czech Republic, therefore the introduction of some elements of the majority system cannot be too radical. The issue of the institution of the Senate provides another problem; it has been accompanied by vehement debates since its establishment. When it came into existence many experts doubted the necessity of an institution like that. Lately, however, they may have reconciled with the idea and now they would rather modify its content than to stop it. This idea was supported by Prof. Dr. Jiří Grospič's lecture and also by the thoughts of other speakers. Dr. Grospič found the problem in the weakness of the Senate and he advised the emancipation of the two chambers of the Parliament. This idea has a part which corresponds with the idea attributed to Dr. Petr Pithart, that is the one that wants to divide each of the branches of power between two authorities so that they could control each other even better (that is, the legislative power would be divided between the House of Representatives and the Senate, the executive power would be divided between the Head of State and the Prime Minister and the judicial power would be divided between the Constitutional Court and the Supreme Court). However, there were many constitutional lawyers, among them Prof. Dr. Pavlíček and Prof. Dr. Šamalík, who doubted the expediency and accuracy of this idea. On the other hand, there is the other variant of the reform of the Senate and it counts with the establishment of regional self-governments and it would like to turn the Senate into a forum of the representation of the regions. Certainly, many more debates can be expected about the content of the Senate in the Czech Republic.

It is clear from the above thoughts that the conference in Prague was held just in time to provide a forum to discuss and evaluate the problems arisen and the first seven years of the running of the Czech and Slovak constitutions, which were adopted in 1992. It may have contributed also to the large-scale appearance

of Czech and Slovak constitutional lawyers at the conference besides the close relatedness of the languages and the awareness of the common past. They not only exchanged their opinion but also tried to draft their doubts about some planned constitutional reforms. For the Polish, German and Hungarian participants it was interesting to see what kind of problems the society of the lawyers of the neighbouring states are interested in. We should hope that there will be more and more opportunities to the organisation of such meetings and also that the interest in each other's problems will increase again at least in the countries of the *Visegrád Agreement.*

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ACTA JURIDICA HUNGARICA
2000 41 Nos 3-4, pp. 255-264

1216-2574 / 2000 / USD 5.00

BOOK REVIEWS

József SZABÓ: **A jogbölcselet vonzásában. Válogatott tanulmányok** (In Attraction of Legal Philosophy. Selected Studies) [Prudentia Iuris 13.]. Bíbor Kiadó, Miskolc, 1999, 225 pp.

József Szabó (1909-1992) graduated from the faculty of law at the University of Szeged and was a student of Gyula Moór, an outstanding legal philosopher of Neo-Kantian philosophy in the inter-war period. Szabó was a prominent representative of the gifted and promising generation, who achieved brilliant careers during the Second World War, and who were involved in the intellectual and scientific renewal of the country after the war. After graduation he became acquainted with Barna Horváth, founder of school and an exceptional personality of Hungarian legal philosophy. Horváth's personality and his legal philosophical approach representing the influence of Anglo-Saxon jurisprudence and legal culture gave rise to Szabó's enthusiasm. It was the period in the Hungarian legal philosophical thinking when, besides the achievements of Austrian, German and French legal philosophy, those of English and American jurisprudence were also considered. Apart from this, Alfred Verdross, professor of international law and legal philosophy at the University of Vienna greatly influenced him, and they became friends for life. Szabó's papers were frequently published in the *Österreichische Zeitschrift für öffentliches Recht,* a journal edited by Verdross.

As a result of Barna Horváth's aim to establish a school, the "school of Szeged" was founded, and it included, besides Szabó, István Bibó, who later abandoned legal philosophy, and also Tibor Vas, who became Marxist in the 1950s and renounced the mentality of the school. Szabó's legal philosophical thinking bears the strongest marks of the master's irradiant influence. He began to elaborate his independent legal philosophical doctrine in the late 1930s.

He was also deeply involved in questions of constitutional and international laws.

During the after-war years he was involved in reorganising the law school of the University of Szeged. After the "decisive year" (1949) like the reputation of many of his contemporaries, his reputation was also ruined. After his long imprisonment, with a short interruption after the revolution in 1956, Szabó lived in intellectual exile for a number of decades. Some of his papers and reviews were published only abroad. Only the last years of his life, after his restitution, brought him the opportunity to be involved in the professional public life of the country for a brief period.

This volume contains three main Szabó's studies of legal philosophy. In his writings *A jog alapjai* [Bases of Law] in 1938, *A jogászi gondolkodás bölcselete* [Theory of Juristical Thinking] in 1941, *Hol az igazság?* [Where is the Justice?] in 1942 Szabó attempts to discredit the Neo-Kantian model by using the outcomes of criticism, according to David Hume, and the American legal realism. Szabó, in his works published in the early 1940s, attempted to create a "neo-realistic" approach to the concept of law. Applying the method common in Anglo-Saxon professional literature, he modelled the essence of legal thinking with describing legal cases. With this kind of approach, he seemed to discover a number of similar features between English and Hungarian "traditional" legal attitudes. Citing the ideas of Jerome Frank, Edward Robinson and Thurman Arnold, the most outstanding personalities of American legal realism, Szabó abandoned belief in legal security, which was, in his opinion, revived by a faulty logical philosophy of law. In his theory he also used Frank's doctrine of "factsceptics" and "rule-sceptics". Szabó claimed that in law enforcement it is not merely the legal norms one is to consider when looking for justice, since the statement of facts is as important a precondition for a righteous judgement as the interpretation of the corresponding law. He believed that legal decisions are influenced by "psychological circumstances".

When reading Szabó's works, one can clearly perceive the ideas of American legal realism. At that time, in the early 1940s, this kind of theory was considered rather exceptional in the Hungarian literature of legal philosophy. The influence exerted by the classical representatives of legal realism is undeniable. When appreciating Szabó's work one can suggest that, in a similar way to the evaluation of Horváth's work, he also gave particular pragmatic explanations to the classical Neo-Kantian problems. Doing so, he created the possibility for a prolific interrelation of two legal cultures, and abolished the previous one-sided Austrian and German orientation in the Hungarian legal philosophical thinking. This is considered very important even if we sometimes come across rather eclectic

explanations. Neither the master nor his student is an exception to this. Regretfully, however, Szabó was not able to work out further systematic explanations to his theory of legal philosophy called "neo-realistic".

The volume is erected adequate monument to the memory of József Szabó. This selected studies, as thirteenth part of "Prudentia Iuris" book-series, was published by Department of Legal Philosophy and Legal Sociology of Miskolc University. A complete Szabó's bibliography may be read at the end of the volume, illustrating this important life-work.

József Szabadfalvi

Csaba VARGA: **Jogállami átmenetünk (Paradoxonok, dilemmák, feloldatlan kérdések)** [Transition to Rule of Law (Paradoxes, Dilemmas, Questions with no Answer)]. AKAPrint, Budapest, 1998, 234 pp.

A collection of papers formulating the basic message while facing some philosophy of law related issues of the process aiming at the successive change of political, economic and legal regime in the Central and Eastern European region, composed of parts on the past characterised as No-law, Transition, Skirmishes and the Game's Rule, Coming to Terms with the Past, Rule of Law, Conformity to Patterns, as well as Attraction and Disattraction in appendix.

The book argues for the *sui generis* nature of the challenge, claiming that rule of law from quasi-law, constitutional democracy from totalitarian dictatorship, market economy from centrally planned structures signal the complexity of unprecedented transformation the new political elite is expected to manage. For in Greece, Portugal and Spain in Europe, so much as in the new democracies of Latin America, the democratic turn meant exclusively a political caesura to draw by winning against previous corruption, but not to undertake basic economic switch-off at the same time. In Germany, Italy and Japan, the process of after-war transformation was marked by military defeat, occupying administration, imposition of values and techniques of implementation, as well as institution of Nuremberg-type trials, with drafters of a new constitutional regime coming only after the job of forcing through a transition was already done and completed. As opposed to such a model of pacification, the "velvet revolution" type of overall changeover is rather marked by unbroken legal continuity, full-pledged framework of the Rule of Law, as well as ethos and prestige—unchallenged and unquestioned—of constitutional democratic establishment. Or, routine practising of the store of instruments available within the frame of the Rule of Law was defi-

nitively set aside in order to resort to externally imposed authorities, and routine was only reinstalled after the extraordinary measures did the job, in the former case. Notwithstanding, everyday Rule of Law routine without any touch of adaptation has to fill all expectations, in the latter case. Thereby Rule of Law, this accumulation of local experience in its historical germ, reaffirmation of growing social consensus in its formation, ideal for everyday routine in normal application, has actually been extended as a panacea to universal use with no variety or limitation, albeit it should be rather seen as an ideal which, even if measured by general and universalisable criteria, may call for a variety of implementations under varying conditions.

As to the underlying notions, *Rechtsstaat*, striving to achieve its goals through comprehensive and across-the-board regulation by attaching guarantee to each aspect it wishes to protect through these regulations, on the one hand, and Rule of Law, resting on the principle of all-covering justiciability by instituting the right to contact a judicial forum for a definitive legal verdict in any such case that may have legal relevance, on the other, are not treated simply and merely as two different legal techniques. Instead, the author argues for the claim of them representing two different legal approaches which are rooted in two different cultures.

N. N.

Felix SOMLÓ: **Schriften zur Rechtsphilosophie** ausgewählt und eingeleitet von Csaba Varga, [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris]. Akadémiai Kiadó, Budapest, 1999, xx + 114 pp.

A collection of papers by the outstanding classic authority (1871–1920) of philosophising on law in Hungary at the turn of century—a philosophy of law professor at the universities of Kolozsvár (1905– 1917) and Budapest (1918–1920)—, as well as of articles on Somló. Among the writings reedited in the volume—including the ones on the new Hungarian philosophy of law (1907), the problem of legal philosophy (1908) and the relationship between sociology and philosophy with particular regard to the foundation of legal philosophy through sociology (1911) , especially the papers on the standards of evaluating the law (1909) and on the law-applying process (1911) herald the neo-Kantian turn in his new legal philosophy. Curriculum vitae and bibliography complete the preface (pp. xiii–xx), and critical articles by Joseph Kohler, Leonidas Pitamic, Redslob and Julius Moór reviewing Somló's work and achievement in legal philosophy are eventually included in appendix (pp. 73–112).

The reprints included in the volume anticipate Somló's famous *Juristische*

Grundlehre (first published in Leipzig in 1917), which is going to be republished in the same sub-series in two subsequent volumes. The tribute to Somló's memory is to be completed by the republication of his papers devoted to some key issues in philosophy and sociology, introducing to his posthumous book-size fragments on the philosophical foundations of neo-Kantian axiology in a complex ontological and epistemological perspective, which will also be included in the planned fourth volume.

Despite that for early Somló legal philosophy and legal sociology were equal in standing, his neo-Kantian conceptualisation led to revision and the separation of these interconnected areas of legal inquiry. By differentiating pure and applied sciences (including so-called normative sciences), he laid the foundations of his own neo-Kantian philosophising in law, in which he proposed to investigate basically two issues: the definition of the preconditions of any law—standing for a research aimed at the concept of law withing the framework of the basic doctrine of law—, and the search for just law (or, in Stammler's original terminology, *richtiges Recht*)—standing for the axiology of law. Based upon theoretical traditions cultivated by, among others, John Austin's *The Province of Jurisprudence Determined* and Karl Bergbohm's *Jurisprudenz und Rechtsphilosophie*, Somló offers an analysis of the concept and conceptual elements of law, regardless of any of its actual or potential contents. The outcome of his realisation substantiated the scholarly reputation in legal philosophy he won both in Hungary and especially in German-speaking territories. Nowadays he is duly regarded as one of the classic authorities of neo-Kantian philosophising on law in Central Europe, among thinkers like Rudolf Stammler, Hans Kelsen, Rudolf Merkl, Gustav Radbruch, and Alfred Verdross.

Csaba Varga

Fejezetek a jogbölcseleti gondolkodás történetéből (Chapters on the History of Legal Theory). Edited by Miklós SZABÓ [Prudentia Iuris 12.]. Bíbor Kiadó, Miskolc, 1999, 265 pp.

A complete book on the history of legal theory has to satisfy two conditions: it has to be comprehensive, that is, has to cover the thoughts of all significant theorists and it has to give an in-depth analysis of the arguments of these theorists. The authors of a short textbook, writing the book with undergraduate students in mind, must necessarily balance the two ideals against each other because of space limitations. Hungarian textbooks of that kind, as I see it, almost always tended to prefer the comprehensive presentation of the

subject-matter to the indepth analyses of arguments. This way vivid theories turn often into a collection of standalone propositions deprived of their theoretical context. For some students studying the history of jurisprudence in so more than memorising the relationship between names on the one hand and concepts propositions, and distinctions on the other. The most important aim of the authors of the present book was to break with this tradition and strike a different balance between the two competing ideals.

The book consist of two parts. The second, and by far the longer part of the book presents the intellectual portrait of 17 major figures of modern legal theory from Immanuel Kant to contemporary legal philosophers, like Ronald Dworkin, Joseph Raz and Jürgen Habermas. The essays follow a uniform pattern: they give a short biography of the authors in question, sketch the intellectual background of the theories, and recapitulate the main argument thereof. The strength of this highly selective approach is clear: in most cases the individual portraits are details though to show the complexities ad sophistication of the original arguments.

The authors of the book tried to compensate the reader for the lack of comprehensive presentation of the subject-matter in two ways. First, as the preface makes clear, the thinkers, whose ideas are presented in the second part, were not selected only because of their own merits, but because they are more or less representative of a certain school of thought. Second, the first part of the book, which consists of three introductory chapters, tries to provide a background or a conceptual map to the individual essays of the second part. The first chapter, written by Mátyás Bódig, approaches the history of jurisprudence from the perspective of the age-old debate between legal positivism and natural law. Mátyás Bódig emphasizes that both schools of thought have to be judged by their best representatives, not by their caricatures. For that purpose both legal positivism and natural law have to be separated from propositions they are unjustly associated with. Both traditions are often criticized because of propositions that were seldom, if ever, defended by the best proponents of these theories or have only a contingent relationship with the most important theses of legal positivism or natural law. If we approach both traditions in good faith the difference between them, as Mátyás Bódig points out by referring to the theories of Herbert Hart and John Finnis, is much smaller than it is usually opposed. The second chapter, written by Miklós Szabó, gives an introduction to the ideas of our schools of legal thought, namely historical jurisprudence, marxism, sociology of law and legal realism that focused on the "social explanation of law„. The last introductory chapter written by

József Szabadfalvi, provides an overview of the history of Hungarian jurisprudence from the 18th century natural law theories to the Neokantian jurisprudence of the interwar period.

The book will be of interest to both philosophers and to those teaching legal theory.

Tamás Győrfi

Kornél SOLT: **Valóság és jog** (Reality and Law). Bíbor Kiadó, Miskolc, 1997, 156 pp.

The author is a representative of a generation with pre-war start, whose academic career has been broken after World War II. Now, political barriers being removed, he faces two tasks at the same time. First, to follow the broken traditions; second, to keep up with the newest developments of his research field. The double task results in a tension between the author's point of view and his comments.

The rutin topic of the book—as noted by the title—is the relation between reality and law. Solt point of view is rather traditional: the structure of law (legal norms) follows the structure of reality, and so does the structure of language and logic. In this way reality serves as ontological foundation of law, language and logic. Anyhow, this point of start serves for the author only to leave it. Analyses of reality, law, language and logic show the other side of the book: they consider the newest developments of relevant literature in order to offer a sensitive and subtle picture of the topics.

We learn that "basic elements" of reality are neither individual entities, nor properties, or relations – they are *facts*. Facts are understood by reference to Wittgenstein's *Tractatus*, not as "bare fats" but as created by human mind. Here we arrive at facts of law as facts, eminently created by human mind. When facing the nature of mind we are invited to *step back* again to the traditional view: mind (or thought) is, and has to, reflect reality: the structure of *representing* cannot be different from that of *represented*. Laws of logic earn ontological relevance: law of identity, law of contradiction and law of *tertium non datur* appear as laws of reality as well.

The way to legal norms drives through language. Following J. R. Searle Solt draws a line between content and force of "information" (more properly: of linguistic expressions). The force of expressions makes it possible to ask a question or to issue an order. By this way language is defined as a "bridge" between law and reality, with reference to Leibniz-Kripke's "possible worlds". The world posited by law belongs to the realm of *future contingens*: it may be realised some time in the future, or may be not.

The central role of language raises the question of indeterminacy of language

and that of nature of definitions. What is indeterminate: the world, or the language, or our knowledge, or our concepts? The author's answer is: the world cannot be indeterminate ("Things are what they are,, B. Russel), so language *and* human knowledge *and* our concepts, which are inseparably intertwined, are indeterminate. Indeterminacy of language is not pathology, it is the very nature of language. That is why we need two tolls to cope with indeterminacy within law: legal definitions and legal interpretation. Next part of the book examines them.

The fore of the book is the question of the relation between law and logic. Instead of aiming at theoretical problems of the relation, Solt introduces the reader to G. H. von Wright's deontic logic Citing von Wright's point: "logic ... has a wider reach than truth" the author presents the basic concepts of deontic logic and possible normative statuses of behaviour.

Final chapters of the book overview some problems, stemming from logical status of law. The firs of them is the problem of the validity of legal norms. The author's final point is that, *despite different views*, logic can be applied to legal norms when examining their validity. The second problem is that of types of legal rules. Solt puts forward the types of universal and individual rules, categorical and conditional rules and their possible combination. The third issue is the problem of collision of norms. He distinguishes between external (law and morals) and internal collisions on one hand, and strong and weak collisions on the other Logic may help *with* dissolving collisions but *it finally* belongs to the realm of individual decisions.

The book can be offered both to students of law and to anybody *being* interested in theoretical questions of law, language and logic.

Miklós Szabó

Miklós SZABÓ: **Trivium: Grammatika, logika, retorika joghallgatók számára** (Trivium: Grammar, Logic, Rhetoric for Law Students). Bíbor Kiadó, Miskolc, 2001.

Szabó's book is based on an interesting conception. It strives to integrate the problems of grammar, logic and rhetoric with respect to the theoretical issues of legal communication. The conception (even in the title of the book) deliberately refers back to the medieval tradition of the "trivium" that summed up the basic subjects of the curriculum of the university: *grammatica*, *logica*, *rhetorica*.

The introduction gives an overview of the university education in the Middle Ages that is to point to the thematic

spectrum of grammar, logic and rhetoric. However, this recourse to a historical explication is (at least partly) misleading. The author has no intention to maintain that his three traditional subjects are still the basic ones with respect to the sciences or even jurisprudence, they lose their original propaedeutic function. He is driven by some other considerations that are almost completely alien to the medieval philosophical context of his subjects. Szabó's key term, "communication" (discussed in the second chapter) that should integrate the elements of the book is not connected to the historical explication. "Communication" is taken as a term developed by some modern social sciences (like social psychology).

His "grammar" goes well beyond the problems of the grammatical structures of communication. It actually centres around the problems of linguistic philosophy (and in some respects the "linguistic turn") and outlines a variety of contemporary theoretical initiatives that concern the problems of language: discourse theory, the theory of speech acts, sociolinguistics, etc. Szabó's "grammar" has two points: it must establish a philosophical position with respect to language that (1) enables us to throw light upon the constitution of legal language and to introduce a concept of legal semiotics (that might be Szabó's primary contribution to the contemporary Hungarian jurisprudence); (2) helps to break the hegemony of classical logic ("a one-dimensional concept of logic") and to reconsider the connection between logic and law. The chapters dealing with the issues of logic pay special attention to the "deviant forms of logical analysis": deontic logic, fuzzy logic, logic of action, etc. One of the great merits of the text (and the approach) is that this approach allows Szabó to give a remarkably sophisticated analysis of the problems of "legal logic".

With respect to "rhetoric", the authors conceptual strategy seems to be the most convincing. The recourse to the medieval tradition underlies his rejection of a reductionist conception in which rhetoric is taken as merely a set of means ("tools", "techniques") that serve "eloquence". Szabó attempts to reclaim the philosophical dignity of rhetoric by pointing to its relevance with respect to the issues of logic, rationality, communication.

The book is a great step forward in respect to Szabó's inquiries concerning an antipositivis and linguistically oriented jurisprudence (put forward in his "legal dogmatics" in 1996). He reached a stage where the original initiative turned into a remarkable theoretical conception unprecedented in Hungarian jurisprudence.

Mátyás Bódig

Péter TAKÁCS: **Nehéz jogi esetek. Jogelmélet és jogászi érvelés** (Hard Cases. A Reader for Law Students). Napvilág Kiadó, Budapest, 2000, 400 pp.

The very idea lying behind the thematical concept of this book, special literary genre, is that practical consequences of theoretical propositions in jurisprudence, on the one hand, and philosophical context of practical legal problems, on the other, can be taught and illuminated by analysing possible and hypothetical legal reasoning in particular real capes. Impressed by this idea the author sheds light theoretical problems as they emerge from legal practice, and points out practical difficulties which can be tackled only byotheoretical knowledge and skills. The term "hard case" is defined in a way so as to encompass not only those cases in which well-informed lawyers differ in their opinion but in which value judgements have some role in influencing the outcome. In this way the introductory chapter presents five famous historical trials having some similarly with trial of recent decades. E.g. the author draws a parallel between trial of Charles I (1949) and that of Ceauşescu (1989) in order to point out some specific feature of law working in political context. The book presents some well-known cases discussed in contemporary British, American and German jurisprudence in a refashioned way, namely with openly altered facts, in order to balance possible arguments and provoke the reader to find his or her right answers, argue for them and practice of the Hungarian Constitutional Court, the Hungarian Supreme Court, and the Hungarian Human Rights Commissioners. After showing several hypothetical cases, such at the Protagoras case or one of Jhering's obscured *Civilrechtsfälle* etc., the book gives a short overview of debated recent judgements of international courts. The book, seemingly, is a reader for law students, but it does not seek to teach rules of any legal systems rather to elucidate the principled and argument-dependent nature of legal phenomena.

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ACTA JURIDICA HUNGARICA, Vol. 41

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Budapest, 2001. május 21.

Lamm Vanda

Printed in Hungary
PXP Ltd., Budapest


1216-2574(2000)41:3/4;1-6